# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1898.

## No. 216.

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THE UNITED STATES, APPELLANT,

vs.

JOHN KRALL.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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INDEX.

1 In the circuit court of the United States for the district of Idaho.

UNITED STATES OF AMERICA
*vs.*
JOHN KRALL. } In equity.

*Bill of complaint.*

*To the honorable judges of the circuit court of the district of Idaho:*

The United States of America, by their attorney, J. H. Forney, and under the direction of the Attorney-General of the United States, the plaintiffs, complaining of the defendant, would respectfully show unto your honors:

1. That in the month of July, A. D. 1864, at the county of Boise, Territory of Idaho (now county of Ada, State of Idaho), the plaintiffs, by and through their officers and troops acting under the direction of the War Department, located upon, occupied, and improved for military purposes the tract of land hereinafter described, and from thence, hitherto, until the present time have continuously occupied and actually used and appropriated said tract as a post reservation.

2 2. That at all times herein mentioned the said plaintiffs were and are now the owners, and have been and now are in the actual possession of said premises, and that the said premises at all times herein mentioned have been and now are reserved from both public and private sale, and which said premises are more particularly described as follows:

All the land included in the following lines: Beginning at a point 2,145 feet N. 68 degrees 34 minutes W. from the flagstaff at fir post 8 feet high and 1 foot in diameter, squared at top and each face marked "U. S.;" thence running S. 20 degrees E. 54.32 chains, to post 1.21 chains from NE. corner of small log building bearing S. 35 degrees E.; thence running N. 70 degrees E. 117.50 chains to stake 4 inches square, 2½ feet high; thence running N. 20 degrees W. 54.32 chains to pile of stones; thence running S. 70 degrees W. 117.75 chains to the point of beginning, and containing 638 acres, more or less. All the bearings are true meridian.

3. That immediately after the location and occupancy and appropriation of said premises as a military post, and prior to the first day of January, A. D. 1868, the President of the United States by proclamation, in pursuance of an act of Congress, duly declared and set apart for military purposes at Boise City, Idaho Territory (now State of Idaho), the premises hereinbefore described, together with all the tenements, hereditaments, and appurtenances thereto, as a post reservation, which is coterminous with the northeasterly boundary line of said Boise City.

4. That over and across the above bounded and described premises runs a valuable stream of water, known as Cottonwood Creek,
3 affording an ample supply for agricultural, domestic, and practical purposes of the officers and troops of said military post, and no more, and that said stream of water, together with all the uses and privileges aforesaid, belong to and are the property of plaintiffs; and

that from the time of the occupancy and location of said post, to wit, the month of July, A. D. 1864, the waters of said stream have been continually used and appropriated, and now are used and appropriated, for all agricultural, domestic, and practical purposes by plaintiff, through its said officers and troops.

5. That the said reservation of plaintiff is of great value for military purposes and as a military post, and that the value of said premises depends altogether upon the flow of the waters of said stream in its natural channel, undeteriorated and undiminished, and plaintiff's right to their uninterrupted and lawful use, and that the waters of said stream are not more than sufficient for plaintiff's use as hereinbefore set forth.

6. That at a point on said stream above the premises hereinbefore described, and before the waters of said stream cross the said premises, the said defendant, his agents, servants, and employees, are now, and have been since June, 1894, actually engaged in wrongfully and unlawfully diverting the waters of said Cottonwood Creek, and the whole thereof, from their natural course over and across the premises hereinbefore described. And the said defendant, his agents, employees, and servants, since said June, 1894, have been and now are actually
4 engaged in diverting and appropriating the waters of said stream, and the whole thereof, and preventing and obstructing the same from flowing in its natural channel across the said military reservation, and thereby rendering the said premises unfit for use and occupancy as a military post.

7. That all the acts of the said defendant in diverting the waters of said stream from its natural channel and depriving the plaintiff from the lawful use of the same were done without the consent and against the will of the said plaintiff, and although directed and requested by the said plaintiff to desist therefrom, the said defendant, without right and contrary to law, still continues to divert and appropriate the waters of said stream, and still continues his operations as hereinbefore set forth. That by reason of the acts of the said defendant, as hereinbefore described, in deteriorating and diverting the waters of said stream from the said premises, and depriving the plaintiff from the use of the same, the said plaintiff is damaged in the sum of five thousand dollars.

8. That plaintiffs have no other plain, speedy, or adequate remedy at law, or otherwise, for the enforcement of their rights herein, and that unless the said defendant is enjoined he will continue, and has threatened to continue, and still continues, to divert and appropriate the waters of said Cottonwood Creek, and destroy the property of plaintiff, and that the acts of the said defendant, set forth as aforesaid, are destructive and continuous, increasing and threatening to increase, and be still more destructive and injurious.

5 Your orators therefore pray that a writ of injunction may issue to the said John Krall, perpetually enjoining him and his agents, servants and employees, from diverting or appropriating the waters of said stream as aforesaid, and that a writ of subpœna may issue to said John Krall requiring him to answer, not under oath, this bill of complaint and the various matters therein set forth, and that a temporary restraining order may issue enjoining him from further diverting the waters of said stream from its natural channel, or in any manner or in

anywise appropriating the same as hereinbefore set forth until the final hearing of this cause, and for other and further relief as may be proper in the premises.

J. H. FORNEY,
*United States Attorney and Solicitor for Complainant.*

UNITED STATES OF AMERICA,
*District of Idaho, ss:*

Now comes J. H. Forney, attorney for the United States, and says that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be upon information and belief, and as to those matters he believes it to be true.

J. H. FORNEY.

Subscribed and sworn to before me this 3rd day of September, 1895.
A. L. RICHARDSON, *Clerk.*

6 (Endorsed:) No. 121. United States circuit court, district of Idaho. The United States of America vs. John Krall. Bill of complaint. Filed Sept. 3d, 1895. A. L. Richardson, clerk.

In the circuit court of the United States for the district of Idaho.

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| UNITED STATES OF AMERICA, COMPLAINANT, *vs.* JOHN KRALL, DEFENDANT. | In equity. No. 121. Subpœna ad respondendum. |

*Subpœna ad respondendum.*

*The President of the United States of America to John Krall, greeting:*

You are hereby commanded that you be and appear in said circuit court of the United States, at the court room thereof, in Boise City, Idaho, in said district, on the first Monday of October next, which will be the seventh day of October, A. D. 1895, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein the United States of America is complainant and you are defend-
7 ant, and further to do and receive what our said circuit court shall consider in this behalf, and this you are in nowise to omit, under the pains and penalties of what may befall thereon.

And this is to command you, the marshal of said district, or your deputy, to make due service of this our writ of subpœna ad respondendum to have then and there the same.

Hereof fail not.

Witness, the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, affixed at Boise City, Idaho, in said district, this 4th day of September, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and twentieth.

[SEAL.] A. L. RICHARDSON, *Clerk.*

*Memorandum pursuant to equity rule No. 12 of the Supreme Court of the United States.*

The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken pro confesso.

I hereby certify that I received the within subpœna on the 6th day of September, 1895, and personally served the same on the 6th day
8 of September, 1895, on John Krall, said defendant, personally, at Boise City, in Ada County, district of Idaho, a copy of said subpœna and a certified copy of the complaint and restraining order in the action named in said supœna attached to said copy of subpœna.

J. I. CRUTCHER,
*United States Marshal.*

Fees, $4.00.

(Endorsed:) Returned and filed Sept. 7th, 1895. A. L. Richardson, clerk.

In the circuit court of the United States for the district of Idaho.

UNITED STATES OF AMERICA
*vs.*
JOHN KRALL. } In equity.

*Answer.*

Now comes the above-named defendant, John Krall, by Silas W. Moody, his solicitor, and makes answer to the complaint filed in said action, and for answer thereto says:

1.

This defendant admits the allegations in paragraph numbered one of said complaint.

9 2.

And for answer to the allegations in paragraph numbered two of said complaint contained, that this defendant says he has no knowledge, information, or belief as to the matters therein stated, and therefore denies the same.

3.

This defendant, answering the allegations in paragraph three of said complaint contained, admits the facts therein alleged.

4.

This defendant, answering the allegations in paragraph four of said complaint contained, admits that over and across the premises therein

mentioned runs a valuable stream of water known as "Cottonwood Creek," but denies that said stream, except as hereinaft'r set forth, affords an ample supply for agricultural, domestic, or practical purposes of the officers and troops of said military post, and denies that said stream of water, together with all the uses and privileges thereof, belonged to or are the property of the plaintiffs, and denies that from the time of the occupancy and location of said post, to wit, the month of July, 1864, the waters of said stream have been continuously used and appropriated, or are now used or appropriated, for all agricultural, domestic, or practical purposes by plaintiff through its said officers or troops.

10

5.

This defendant, for answer to the allegations in paragraph five of said complaint contained, admits that the said reservation of the plaintiff is of great value for military purposes and as a military post, but denies that the value of said premises depends altogether upon the flow of the waters of said stream in its natural channel, undeteriorated and undiminished, and denies that the plaintiffs have a right to their uninterrupted use, and denies that the waters of said stream are not more than sufficient for plaintiffs' use, except as hereinafter set forth.

6.

And for answer to allegations in paragraph six of said complaint contained said defendant denies that at a point on said stream above the premises therein mentioned, and before the waters of said stream cross the said premises, defendant was at the time of the commencement of this action engaged in wrongfully or unlawfully diverting the waters of said creek, or the whole thereof, or any part thereof, from their natural course over and across the premises thereinbefore described, and avers the truth to be that at said last-mentioned date, and for a long time previous thereto, there was no water in said creek at said point except as hereinafter stated whatever. Defendant denies that since the month of June, 1894, he wrongfully or unlawfully diverted the waters of said Cottonwood Creek, or any part thereof, from their natural

11 course over and across said military post, either by himself, his agents, servants, or employees; and further denies that this defendant, his agents, employees, or servants, since said July, 1894, wrongfully or unlawfully diverted or appropriated the waters of said stream, or any part thereof, or unlawfully or wrongfully prevented or obstructed the same from flowing in its natural channel across said military reservation, or by any wrongful or unlawful act or means whatever rendered the said premises, or any part thereof, unfit for occupancy or use as a military post.

7.

For answer to the allegations in paragraph seven of said complaint contained defendant says that he denies that he has done any act or thing whereby he has unlawfully or wrongfully deteriorated or diverted the

waters of said stream from said premises or deprived the plaintiff unlawfully or wrongfully from the use of the same, or that said plaintiff is damaged in the sum of five thousand dollars thereby, or in any sum whatever.

And for further answer to said plaintiff's complaint this defendant alleges that the waters of said Cottonwood Creek are produced by melting snows and mountain springs flowing down through the gulches at the head of said creek on the mountains in the rear of said military post; that said channel of said stream is, to a large extent, filled with boulders, rocks, and débris, and that by reason thereof during the dry seasons of the year the waters of said creek sink from sight and flow along the bed-
rock of said stream without coming to the surface, except in places
12 where the obstructions are such as to force the water to the surface; that in the late winter and spring months of each year there is a volume of water in said creek flowing across said military post in the channel of said stream more than sufficient for use for all the purposes mentioned in said complaint for useful and practical purposes at said post; that the officers and troops, while such flow continues, have never used all of said waters for the purposes alleged in said complaint, and at the time of the commencement of this action permitted, and now permit, large quantities of the waters of said stream to flow across and off from said post without using the same for any purpose or purposes whatsoever. That during the years 1894 and 1895, one Peter Sonna, and his associates, whose names are unknown to this defendant, without defendant's consent, diverted a large amount of the waters of said stream from the head waters thereof, and above the point on said stream where plaintiff alleges this defendant has obstructed and diverted the same, and led the same through pipes to a reservoir on said military post, and that said military post, the officers and troops thereon stationed, have used the waters so stored in part, and have permitted large quantities thereof to pass across said reservation and to be used by the said Peter Sonna for mechanical and other purposes, thereby preventing said waters from flowing in their natural channel over and across said military reservation.

This defendant, further answering said complaint, says that pursuant
to the laws of the then Territory, now State of Idaho, he located
13 and claimed a perpetual water right, by duly posting and recording a notice there to five hundred cubic inches, delivered under a four-inch pressure of the waters flowing in said creek, on or about December 11th, 1877, for agricultural, domestic, and other useful purposes, which waters were to be diverted from said creek at a point thereon about one mile and a half above the easterly limits of said reservation, and has diverted and conducted the same through a ditch of sufficient dimensions, and employed and used the same for such purposes; that by virtue thereof he has secured patent under the desert land laws of the United States to about one hundred and sixty acres of valuable land covered by said ditch, on which he has planted a large and valuable orchard of fruit trees, and has annually cultivated and irrigated the same and also large tracts of grain, 'or more than ten years last past with the waters of said creek under said perpetual water right; that without said waters said land and orchard would be valueless and unproductive, and the same would relapse into its original waste and arid condition; that

he has spent in improvements on said land about eight thousand dollars, and that without said water said land and improvements would become almost wholly worthless; that during said winter, spring, and early summer months there is more than sufficient water in said stream to supply both the said military post and this defendant with sufficient quantities for necessary cultivation and irrigation, and for other useful and practical purposes.

And for further answer this defendant alleges that there is not
14 to exceed, and never has exceeded, more than five acres in extent on said military post which the officers or troops thereof have cultivated or irrigated by the use of the waters flowing in the channel of said Cottonwood Creek across said military reservation; that in ordinary seasons the surface flow of water in said Cottonwood Creek ceases during the midsummer months at nearly all points on said creek lying east of said reservation, but that the waters come to the surface about one-half a mile above the land on said reservation cultivated by said officers and troops, and that at all times during the irrigating season there is more than sufficient water flowing in the channel of said stream past the point where the same could be easily diverted therefrom to suitably and sufficiently accomplish the irrigation of the entire tract of land heretofore usually irrigated on said post from the waters flowing in the channel of said stream across said reservation.

Wherefore defendant prays that this suit may be dismissed at plaintiffs' costs, and for such other, further or different relief as may be meet in the premises.

SILAS W. MOODY,
*Defendant's Solicitor.*

Service of the within by copy admitted this 10th day of Jan., 1896.

J. H. FORNEY,
*United States District Attorney.*

(Endorsed:) No. 121. Circuit court of the United States, district of Idaho. The United States of America vs. John Krall. Answer
15 to complaint. Filed Jan. 3rd, 1896. A. L. Richardson, clerk. Silas W. Moody, defendant's solicitor.

In the circuit court of the United States for the district of Idaho.

UNITED STATES OF AMERICA, COMPLAINANT,
*vs.*
JOHN KRALL, DEFENDANT. } In equity.

*Appearance of defendant.*

Comes now the above-named defendant by Silas W. Moody, his solicitor, and enters his appearance in said action.

SILAS W. MOODY,
*Solicitor for Defendant.*

(Endorsed:) Circuit court of the United States for the district of Idaho. The United States vs. John Krall. Appearance of defendant. Filed Sept. 28th, 1895. A. L. Richardson, clerk. Silas W. Moody, solicitor for deft.

16 In the district court of the United States for the district of Idaho.

UNITED STATES OF AMERICA
*vs.*
JOHN KRALL. } In equity.

*Replication to answer.*

*To the honorable judges of the United States circuit court for the district of Idaho;*

The replicant, the United States, saving and reserving to themselves, and to each of them, all and all manner of advantage of exception, or otherwise, which may be had and taken to the manifold errors and uncertainties and insufficiencies of the answer of John Krall, defendants to the bill of the above-named plaintiff, for replication thereto say: That they do and will aver, maintain, and prove their said bill to be true and certain and sufficient in law to be answered unto by the said defendant, and that the answer of the said defendant to the said bill is uncertain, evasive, and insufficient in law to be replied unto by these replicants without that, any other matter, or thing in the said answer to said bill contained material or effectual in the law to be replied unto, and
17 not herein and hereby well and sufficiently replied unto, confessed or denied, traversed or denied, is true, all which matters and things this replicant are ready to aver, maintain, and prove as this honorable court may direct, and humbly pray as in and by their said bill they have already prayed.

J. H. FORNEY,
*United States Attorney, Solicitor for Plaintiff.*

Service of the within by copy admitted this 12th day of March, 1896.

SILAS W. MOODY,
*Defendant's Attorney.*

(Endorsed:) Filed March 11th, 1896. A. L. Richardson, clerk.

In the circuit court of the United States for the district of Idaho.

UNITED STATES OF AMERICA
*vs.*
JOHN KRALL. }

*Opinion.*

J. H. Forney, counsel for the United States, and Silas W. Moody, counsel for the defendant.

By the testimony and stipulated facts in this case, it appears
18 that the military reservation at Boise was set apart as such prior to 1869, and has been so continuously occupied since 1864; that about 200 acres are level, and are and can be used for quarters, drill grounds and other useful purposes connected with the proper use and comfort of the garrison; that, as located, Cottonwood Creek by its natural channel flows through the reservation, and from it the post is supplied

with water for irrigation for the growth of trees, of grass and sod, for parade and drill grounds, and other purposes.

Defendants, in 1877, located for agricultural uses 500 inches of water from said creek, the place of diversion being at a point above where the creek enters such reservation; that from said place of diversion he conducted the water to land he owns in the neighborhood; that he has since continued to use such water, and that by such use the post has been deprived of it to such an extent that at least during a portion of the time there has not been sufficient for the post, and for want of it some of the trees planted have died.

The Government now asks that defendant be perpetually restrained from the use of any water of such creek.

It thus appears that the Government was in possession of the reservation and the stream running through it long anterior to any attempt by defendant to appropriate the water, and it appears to me that the law of the case is settled by a decision of the Supreme Court which counsel seem to have overlooked.

19 By Sturr v. Beck (133 U. S. 541) it appears that one Smith, in 1877, homesteaded a tract of land in Dakota, over which flowed a stream of water; that in 1880 Sturr went upon this land, located a water right, and diverted the water to his own land adjoining, whence he continued to use it until 1886, when Beck, the grantee of Smith, notified him to desist. Neither Smith nor Beck had made any location of the water, nor diverted it prior to Sturr's location thereof, which he made in accordance with the custom there existing, for the location of water rights.

The court held that the land, through which the stream flowed, having been located before the water right was claimed, the owner of the land, as riparian proprietor, was entitled to the water of the stream, and no other person, under any subsequent claim, could divert it. In this case, treating the Government as a citizen, we find it in possession of the land through which the creek flows, and in the use of its waters prior to any claim for it made by defendant, and under this authority would be entitled to the use of the water. The fact of defendant's use for a long period, in the absence of any consent or grant by the Government, gives him at best but a revocable license, as was said in the case above noted. But the Government has a superior right to any which the citizen can have. Save such Indian title to the public lands as it chooses to recognize, it has such absolute title to them and the waters therein that it may do with them as it will, including their withdrawal from all claim or appropriation by the citizen, when not already granted or conveyed. In

20 this case it did, long prior to any attempted appropriation of the water by defendant, set apart and dedicate to its special use the reservation in question. There can be no doubt that by this act, at least, the right of a riparian owner at once attached in its behalf to the water. But the land without the water would be useless as a military reservation; the location of the one could operate as notice of the intended use of the other. The Government is not bound any more than an individual to at once make use of all the water it expects to need, but it may from time to time increase its use as its conveniences or necessities may require. It can not be held to anticipate all its future wants and uses for the water, and give notice thereof.

The conclusion is that the Government has the absolute ownership and control of all the waters of said creek, and that defendant can have no claim thereto, nor any use thereof, except such as the Government or its authorized agents may from time to time permit. However such rule may appear, it can not, upon reflection, be considered harsh. The cause of the Government is nothing less than the cause of the people. To their joint interest that of the individual citizen must often yield. The strict rules of limitation and laches which often embarrass the citizen can not be applied to it. That it may protect the people, for which it is instituted, all statutes and rights must be liberally construed in its favor, otherwise through the neglect or oversight of its trusted agents, or the greed and rapacity of the individual citizen, its powers would often be so hampered that it would become a feeble protector of the people.

21 By this conclusion the defendant may suffer, but he had long notice of the location of this reservation, and of the use by the post of the waters of this stream, and he could not avoid knowing that the water was absolutely necessary therefor. He can not complain if he is now prevented from using what he never had the right to take, and what he could know the Government was likely to need, and what it certainly contemplated using when it located the reservation. That the present commandant is doing more than has ever been done to beautify the post, as well as to make it useful and healthful for the garrison, and consequently requires more water, is greatly to his credit, and in his lawful use of all the water needed for such purposes he is entitled to the support of the courts. In accordance with this decision, an injunction will be issued against the defendant, permanently restraining him, and all his agents, servants, and representatives whomsoever, from using any of the water of such Cottonwood Creek, or from interfering with it, in its natural flow, but this shall not be construed to prevent the commandant of the post from permitting such use of the water as will not, in his opinion, deprive the post of any that may be needed therefor.

Dated June 23rd, 1896.

JAS. H. BEATTY, *Judge.*

(Endorsed:) United States circuit court, dist. of Idaho. The United States vs. John Krall. Opinion. Filed June 24th, 1896. A. L. Richardson, clerk.

22 In the circuit court of the United States for the district of Idaho.

UNITED STATES OF AMERICA
*vs.*
JOHN KRALL.

*Judgment.*

This cause came on regularly for trial at the April, 1896, term, Jas. H. Forney, U. S. district attorney, appearing as counsel for plaintiff, and Silas W. Moody, esq., for the defendant; the cause was tried before the court, sitting without a jury, upon an agreed statement of facts, and the evidence being closed, and after argument of counsel, the cause was submitted to the court for consideration and decision, and after due delibera-

tion thereon the court delivers its decision in writing, which is filed, and orders that judgment be entered in accordance therewith in favor of plaintiff and against defendant, as demanded in the prayer of the complaint in said cause.

It is, therefore, by virtue of the law and by reason of the premises aforesaid, ordered and adjudged that a writ of injunction issue to the said defendant, John Krall, perpetually enjoining him and his agents, servants, and employees from diverting or appropriating the waters of
23 Cottonwood Creek flowing through the military reservation, at Boise, from its natural channel, the said military reservation being described as follows, to wit:

Beginning at a point 2,145 feet N. 68 degrees 34 minutes W. from the flagstaff at fir post 8 feet high and 1 foot in diameter, squared at top and each face marked "U. S.," thence running S. 20 degrees E. 54.32 chains, to post 1.21 chains from N. E. corner of small log building bearing S. 35 degrees E.; thence running N. 117.50 chains to stake 4 inches square, 2½ feet high; thence running N. 20 degrees W. 54.32 chains to pile of stones; thence running S. 70 degrees W. 117.75 chains, to the point of beginning, and containing 638 acres, more or less. All the bearings are true meridian.

And ordered that this judgment shall not be construed to prevent the commandant of the post from permitting such use of the water as will not, in his opinion, deprive the post of any that may be needed therefor.

It is further ordered that the said plaintiff do have and recover of and from the said defendant, John Krall, its costs herein expended and taxed at the sum of $46.40.

Judgment entered May 24, 1896.

JAS. H. BEATTY, *Judge.*

(Endorsed:) No. 121. United States circuit court, dist. of Idaho. The United States vs. John Krall. Judgment. Filed June 24, 1896. A. L. Richardson, clerk.

24 In the circuit court of the United States for the district of Idaho.

UNITED STATES OF AMERICA
*vs.*
JOHN KRALL. } In equity.

*Order extending time to file and serve bill of exceptions.*

On motion of the defendant's attorney, it is hereby ordered that said defendant, John Krall, have until the 25th day of July, A. D. 1896, in which to draw up, file, and serve a bill of exceptions in the above action.

Dated Boise City, Idaho, July 3d, 1896.

JAS. H. BEATTY, *Judge.*

(Endorsed:) No. 121. In the circuit court of the United States, district of Idaho. The United States of America vs. John Krall. In equity. Order extending time to file and serve bill of exceptions. Filed July 3d, 1896. A. L. Richardson, clerk. Silas W. Moody, atty. for defendant.

25 In the circuit court of the United States for the district of Idaho.

UNITED STATES OF AMERICA
*vs.*
JOHN KRALL. } In equity.

*Defendant's bill of exceptions.*

Be it remembered that the above action was commenced in said court by filing a bill of complaint on the 3rd day of September, A. D. 1895; that on the 4th day of September, A. D. 1895, it was ordered by the court that the said defendant, John Krall, his agents and servants, be severally restrained until the further order of the court from doing any of the acts complained of in said bill; that pursuant to stipulations made and entered into by the solicitors of the respective parties to said action extending the time to appear and answer said bill of complaint, the said defendant filed his answer to said bill of complaint, January 3rd, A. D. 1896, to which plaintiff filed a replication March 12th, 1896; that on April 16th, 1896, the following stipulation was made and entered into between counsel for the respective parties to said action and filed therein.

26 In the circuit court of the United States for the district of Idaho.

UNITED STATES OF AMERICA
*vs.*
JOHN KRALL. } In equity.

*Stipulation.*

It is hereby stipulated and agreed by and between the respective parties hereto that the following is a substantial statement of facts which would be testified to and of the evidence which could be ad'uced at a trial or hearing had of the issues herein; that this statement may be considered by the court at any hearing, the right being reserved by each party to introduce further testimony at such time or times.

STATEMENT OF FACTS.

The lands described in the complaint (paragraphs 1, 2, and 3 of complaint) were set apart prior to January 1, 1868, by the President of the United States for military purposes as a post reservation, and have been continuously occupied by the military forces of the United States
27 since July, A. D. 1864, about fifty acres being actually used and occupied for drill, exercise, quarters, and barracks, 150 acres being sagebrush land, used and susceptible of being used for drill and military purposes, the remaining 438 acres being mountainous land, occupied in the summer only to the extent of grazing the post herds of mules, cows, and occasionally a few horses belonging to the post. No portion of the reserve has been fenced by the Government of said 438 acres, and the same is open, and, so far as observable to ordinary persons, can in no way be distinguished from the other mountainous unsurveyed lands which surround the tract on three sides. Order and plats of said reserve hereto annexed and marked Exhibits A, B, and C.

The said 200 acres lie in a tract contiguous to the northeasterly boundary line of Boise City, State of Idaho, consist for the most part of flat bottom land, capable of producing crops when irrigated properly. About 25 acres of these 200 acres in the southwest corner are used for several months in the year as drill grounds for cavalry horses and troops, and while devoted to such purposes are wholly rendered unfit for agricultural crops. About 2½ acres are used for parade grounds and enclosed by barracks, buildings, and fences; this enclosure has been seeded down and is in greensward, kept close cropped. Adjoining the last-named tract on the southerly side are noncommissioned officers' quarters and shops, woodyards and privates' families quarters, about 2 acres; to the southwesterly and westerly of the parade grounds is a tract of land which at the time of the commencement of this suit
28 had not been fenced, consisting of about 20 acres, devoted to infantry drill, drilling of new recruits, ball playing by privates, picketing cavalry and roadways, and which can be properly described as sagebrush land, and which has never been cropped to grass or other farm products; in the northwest corner contiguous to the city line a garden spot of about 4 acres has been fenced in, which is cultivated by the post troops and companies.

Immediately to the north of the parade grounds are situated the officers' quarters, consisting of 6 or 7 dwelling houses, all fronting on one street and facing the parade ground, and are situated on the first rise of the foothills above the flat or plain, at an altitude of about 60 feet above the level of the plain.

Behind the officers' quarters, and at least 60 feet higher up the mountains, are two water reservoirs; above the officers' quarters no effort has ever been made by the occupants to cultivate the lands.

On the northeast corner of the cavalry drill tract the Cottonwood canyon breaks from the mountain into the plain; this canyon extends up the mountain side mostly through precipitous and narrow defiles in the mountains, and has many tributaries, the principal of which are (naming them in order as one ascends the canyon) "Curlew Gulch," "Picket Pin Gulch," and "Five-Mile Gulch." Each of these gulches has tributaries in turn, and by means of these gulches the melting snows, the waters of the mountain springs, and the rainfalls are finally
29 gathered in their downward flow in the Cottonwood canyon, and constitute what is called Cottonwood Creek.

At such seasons of the year as the snows are melting or rainfall occurs, and while the grounds remain seeping, Cottonwood Creek flows steadily, and carries a volume of water more than sufficient for the irrigation of all the tillable and irrigable lands of both parties to this action; but about the beginning of June or last of May in each year the source of supply is confined principally to the springs in the gulches and canyons; the stream is thereby diminished to such an extent from Krall's point of diversion across the reservation that there is not sufficient surface water to irrigate the parade grounds.

Owing to the character of the Cottonwood Creek bed which, in many places, is filled to an unknown depth with loose rocks and débris caused by attrition of the waters and the crumbling effects of frost and moisture, and that in many places the canyon is intersected with lava dykes, the

waters sink below the surface of the creek and disappear until again brought to the surface by the obstructing dykes, so that in many places in the canyon large quantities of water may be seen flowing on the surface, while just below the stream appears to be wholly dried up; especially is this observable at the times when the supply is only from the springs, as it is a marked peculiarity of said springs to run almost dry in the daytime and to flow freely at night during the dry season.

During the month of July it is usually the case that heavy
30 rainfalls occur upon the mountains in the vicinity of the canyon, and for periods of from three days to a week the Cottonwood Creek presents the same ample flow of water as in the earlier season of the year.

In 1877 the defendant located, for agricultural irrigation and other and domestic and useful purposes, 500 inches of the waters flowing in Cottonwood Creek, and diverted them upon the lands adjacent and in the vicinity of the easterly and southeasterly side of the military reservation, and has continuously used, and is now using, such waters, or portions thereof, for agricultural and irrigating purposes ever since that time upon such lands.

His lands consist of a homestead of 160 acres, a desert entry of 160 acres, and his wife's desert of about 70 acres; he has expended between $8,000 and $10,000 in the construction of necessary ditches, flumes, reservoirs, laterals, and other improvements necessary for the reclamation of such lands, which were all desert in character, and of a class known as "arid lands," incapable of producing crops of fruit without the application of water. By means of the use of this water and the rights claimed under such location, he and his grantee have acquired title to said desert lands, and have been enabled to cultivate large annual crops of farm produce annually, and to propagate large orchards, which without the water they could not have done.

The point of diversion of said waters is in Cottonwood Gulch at the junction of the streams issuing from "Picket Pin Gulch" and its
31 tributaries with the Cottonwood Creek, about 2¾ miles from the mouth of Cottonwood canyon, and about one mile east of the easterly line of the reservation, on the public and unsurveyed lands of the United States, at a point whose altitude is about 400 feet above the level of the flat or plain portion of the reservation.

From the year 1877 until the present time the defendant has had the continuous adverse possession of his water right, except as hereinafter shown. At a point below the point where defendant diverts water from Cottonwood Creek, east of the easterly line of the reservation, one Joseph Pecotte has for about 25 years last past diverted water from said creek for irrigation purposes by means of a ditch of about 50 inches capacity, thereby diminishing this flow of water in said creek, which would otherwise flow down to the point where this complainant diverts the waters by his ditch near the mouth of the canyon.

On or about the year 1894 one Peter Sonna and his associates, without the consent of the defendant, went upon the head waters of said "Five-Mile Gulch," one of the main tributaries of Cottonwood Gulch, and at sundry points gathered and appropriated the waters of large and flowing springs there situated and which are supply springs of said "Five-Mile

Gulch" and the stream there situated, and about four miles above the point of the defendant's diversion, and conveyed the waters of said springs by means of pipes and mains, the latter being commonly
32 known as "2-inch pipe," down the mountains to the reservoir before mentioned as located above the officers' quarters on the reservation. The reservoir has a capacity of about 570,000 gallons. The waters so gathered and conducted were and now are stored in said reservoir, and distributed therefrom from time to time as hereafter shown. A portion of the waters from the springs, if not diverted, would eventually flow into Cottonwood Creek above defendant's point of diversion.

For a few years the commandant, shortly after the establishment of the post, gathered some of the waters of the Cottonwood in a reservoir and conducted the waters from thence through a small pipe to the plain below. This reservoir was about ¼ mile above the mouth of Cottonwood Canyon, and, together with a small ditch taken out at the mouth of the canyon, furnished all the water required; but this ditch and reservoir are now destroyed. Subsequently the commandant caused the waters of some springs situated in "Curlew Gulch" to be gathered and conveyed through pipes and reservoired off the foothill immediately in the rear of the officers' quarters, said last-mentioned reservoir having a capacity of, viz, 48,000 gallons, which waters so gathered would otherwise flow into Cottonwood Creek at a point above where complainant diverts the water into his present irrigating ditch, which is a small ditch for irrigating purposes that has been taken out at the head of the plain, in the mouth of the canyon, and is led out above and over the lower portions of the hospital grounds, and has several laterals covering the parade ground and the land lying westerly and southerly thereof.

33 On the southwesterly side of the reservation a four-inch pipe has been connected with the last-mentioned ditch, which conveys the waste water, if any, therefrom upon two blocks of land outside the reservation and within the Boise City town site.

A portion of the reservation plain can be covered and irrigated by the waters of the "Walling" or "Perrault" ditch, and the garden is partially irrigated from that source, the owner of said ditch having granted the Government the right to the use of water in part consideration of a right of way for the ditch across the reservation.

The waters stored in the Sonna reservoir aforesaid are used for fire purposes only on the reservation, and are also conveyed through mains about ¾ mile into Boise City, where they are used in the running of a passenger elevator in one of the largest office buildings of the city, for drinking and closet purposes therein and for domestic in several city residences, and, in case of danger, for fire purposes, through hydrants located along the line of said main.

An artesian well, as an experiment, has been by the military authorities bored in Cottonwood Canyon, about ¼ mile above the mouth thereof, from which a flow of water, estimated about 30,000 gallons per day, has been obtained, which water flows into Cottonwood Creek above the point where the reservation irrigating ditch has been taken out, and which waters can be used for irrigating at any point on said plain.

34 The City Artesian Hot and Cold Water Company furnished water for the residents of Boise City, and whose works are ample

to supply water for all purposes, could connect their mains with the water pipes of all the buildings of any importance on the reservation.

There are about 1,500 trees planted on the reservation, all of which can be irrigated either by the waters of Cottonwood or by the waters contained in the pipes and reservoirs heretofore mentioned.

At no time since the year 1864 has there been any attempt made by the Government to cultivate, to crop, or otherwise, more than 15 acres on said reservation.

One irrigation inch per acre is sufficient for the purpose of successful irrigation of crops, trees, or agricultural produce.

J. H. FORNEY,
*For Plaintiff.*

SILAS W. MOODY,
*Defendant's Solicitor.*

(Here follows map marked P. 34½.)

35 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
*Washington, D. C., September 20, 1895.*

I, S. W. Lamoreux, Commissioner of the General Land Office, do hereby certify that the annexed copy of letter from the Acting Secretary of War to the President, dated April 3, 1873, with the President's order, dated April 9, 1873, endorsed thereon, reserving for military purposes certain land in Idaho Territory for the post of Fort Boise, in said Territory; also copy of plat referred to in the letter from Acting Secretary of War, are true and literal exemplification of the originals of said President's order and plat on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington, on the day and year above written.

S. W. LAMOREUX,
*Commissioner of General Land Office.*

2160 WAR DEPARTMENT,
*Washington City, April 3rd, 1873.*

*To the President of the United States.*

SIR: In accordance with a recommendation of the commanding general, Department of the Columbia, I have the honor to request that the reservation for the post of Fort Boise, Idaho Territory, as delin-
36 eated on the accompanying plat, be declared and set apart for military purposes.

I am sir, very respectfully, your obedient servant,

GEO. M. ROBESON,
*Acting Secretary of War.*

(Here follows diagram marked Page 36½.)

37 WAR DEPARTMENT,
*Washington, April 3, 1873.*

Acting Secretary of War requests that post reservation be declared at Fort Boise, Idaho Ty., in accordance with enclosed plat.

Copy taken in A. G.'s Office, Apr. 11, '73.

EXECUTIVE MANSION,
*Washington, April 9, 1873.*

The within request is approved, and the reservation is made accordingly. The Secretary of the Interior will cause the same to be noted in the General Land Office.

U. S. GRANT.

(Endorsements:) Exhibit B, No. 121.

Office Judge-Advocate-General. War Department, 1577. Sept. 27, 1895. Authenticated copies of map of reservation of Fort Boise, Idaho, and order of President reserving same.

EXHIBIT C.

UNITED STATES OF AMERICA, WAR DEPARTMENT,
*Washington City, September 30, 1895.*

I hereby certify that the paper hereto attached is a true copy of the original official printed General Order, No. 10, Headquarters Department of the Columbia, dated May 3, 1873, on file in the Judge-Advocate-General's Office, War Department.

G. NORMAN LEIBER,
*Judge-Advocate-General.*

38 Be it known that G. Norman Leiber, who signed the foregoing certificate, is the Judge-Advocate-General, United States Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof I have hereunto set my hand and caused the seal of the War Department to be affixed on this 1st day of October, one thousand eight hundred and ninety-five.

[L. S.] DANIEL S. LAMONT,
*Secretary of War.*

General orders, }
No. 10. }

HEADQUARTERS DEPARTMENT OF THE COLUMBIA,
*Portland, Oregon. May 3d, 1873.*

The President of the United States, on the 9th day of April, 1873, having declared and set apart for military purposes at Fort Boise, Idaho Territory, a post reservation, the boundaries are, in conformity with instructions from the Adjutant-General's Office, dated April 14, 1873, announced for the information of all concerned, viz, all the land included in the following lines: Beginning at a point 214.5 feet N. 68° 34′ W. from the flagstaff at fir post 8 feet high and 1 foot in diameter, squared at top, and each face marked "U. S.;" thence running S. 20° E. 54.32 chains to post 1.21 chains from N. E. corner of small log building

bearing S. 35° E.; thence running N. 70° E. 117.56 chains to stake 4 inches square, 2½ feet high; thence running N. 20° W. 54.32
39 chains to pile of stones; thence running S. 70° W. 117.75 chains to the point of beginning, and containing 638 acres, more or less. All bearings are true meridian. By command of Colonel Jeff. C. Davis.

H. CLAY WOOD,
*Assistant Adjutant-General.*

Official:
H. CLAY WOOD,
*Assistant Adjutant-General.*

(Endorsed:) Exhibit C. No. 121. Recd. M. & R. Div., War Dept. Oct. 1, 1895.

That on the 8th day of May, 1896, the said defendant, John Krall, presented to the court the following motion, viz:

In the circuit court of the United States for the district of Idaho, central division, at chambers.

THE UNITED STATES OF AMERICA
*vs.*
JOHN KRALL. } In equity.

*Motion to modify restraining order.*

Comes now the said John Krall, respondent, by Silas W. Moody, his solicitor, and moves that the restraining order heretofore made and entered herein may be modified, and that the said respondent,
40 until the further order of this court, may be permitted to divert and take from Cottonwood Creek and its tributaries, at a point where Cottonwood and Picket Pin gulches unite, all the waters of said creek and tributaries, except fifteen irrigation inches, which shall be permitted to flow down and beyond said point of diversion.

JOHN KRALL,
By SILAS W. MOODY,
*His Solicitor and Counselor.*

(Endorsed:) United States circuit court for the district of Idaho, central division. The United States of America vs. John Krall. In equity. Motion to modify restraining order. Filed May 8th, 1896. A. L. Richardson, clerk. Silas W. Moody, solicitor and counsel for John Krall, respondent.

That the said court refused to allow said motion, and overruled the same, to the overruling of which motion the said respondent, John Krall, by his counsel, then and there duly excepted, which exception was allowed by the court.

That said cause coming regularly on to be heard before the court, without a jury, on the 15th day of June, A. D. 1896, it was stipulated and agreed between the parties to said action that the creek marked on

the plat shown as Exhibits A and B as "Tree Stone" Creek was identical with Cottonwood Creek mentioned in the pleadings herein.

And thereupon the plaintiff introduced the following testimony in its behalf.

41 In the circuit court of the United States for the district of Idaho.

UNITED STATES OF AMERICA,
*vs.*
JOHN KRALL.

In the above-entitled cause, in pursuance of the stipulation now on file, the following additional testimony is taken:

HENRY C. COOK, being duly sworn in behalf of the Government, testified as follows:

Examined by Mr. FORNEY:

Q. State your residence and occupation.

A. Residence, at the post of Boise Barracks, and am commanding officer.

Q. How long have you occupied that position?

A. A little over a year and a half.

Q. Are you acquainted with Cottonwood Creek, and also the point of diversion on that creek, by John Krall, of certain water?

A. Yes, sir; I am acquainted with Cottonwood Creek and the point of diversion.

Q. You may state to what extent, during the summer of 1895, the water was diverted from the reservation by the said Krall.

42 A. Early in the summer of 1895 it was brought to my notice that the supply of water was very small from Cottonwood Creek. In consequence of this the trees and ground could not receive sufficient for irrigation. It was discovered at that time that the water was being diverted, at the point mentioned by Mr. Krall, when I sent a man up there to watch and discover.

Mr. MOODY. You needn't state what the man discovered.

A. I placed a man there to see, and to have the water turned into its natural channel, whenever he found it diverted. This diversion was so frequent that I was obliged to keep a man all summer to turn the water into its natural channel again.

Q. For what purpose did you use this water?

A. For the purpose of irrigation of the trees, the parade grounds, and post garden.

Cross-examination by Mr. MOODY:

Q. This point of diversion is not on the reservation, is it?

A. No.

Q. How many acres of land of reservation did you have in actual cultivation in 1895?

A. Do you mean actually cultivated as garden, or cultivated as parade ground, including trees and all that?

Q. I want to get at what you used the irrigation for—how many acres there actually are?

A. Possibly, I should think there were about 20 acres in the post garden, and there must be a hundred acres where water is required.

43 Q. That is not the question.

A. That is under cultivation.

Q. Did you have 20 acres of land on the reservation cultivated in garden, planted or sowed, which you irrigated?

A. Yes, sir; I think there was about 20 acres in '95.

Q. Did you have at the same time 100 acres cultivated and seeded to grass on the reservation?

A. The irrigation or water would be required to run over about 100 acres to cover what we wanted to cultivate, to make the trees and grass grow and improve the parade ground, by growing sod thereon. It is carried in ditches to irrigate the trees, or is so used when we can get it. It is to be distributed to the trees in different parts of the post, and to the parade ground, as we can get it.

The COURT. What is it distributed to the parade ground for?

A. To make the grass grow and to make the sod strong and solid, and we can do it if we have water on it.

Q. You mean to say that you desire water, if you can get it, to cover all this 100 acres?

A. To cover the entire ground and to make the soil for the purpose of raising sod and grass.

Q. In the garden, how many acres of vegetables did you actually raise in 1895?

A. Well, I can't answer that question, for I don't know. I know vegetables were raised and supplied both organizations, the quantities of which I do not know.

Q. Was it the full 20 acres?

44 A. It was on the ground that I supposed would be about 20 acres.

Q. Raised on that ground?

A. Was on the ground used for that purpose; there were a great many more acres that were not used.

Q. Were there 20 acres of garden cultivated on which you raised the crops?

A. As I said before, about 20 acres.

Q. Was there, as a matter of fact, not more than 10 acres of garden?

A. To the best of my knowledge and belief there may have been about 20 acres of land under cultivation, more or less.

Q. You never measured this, have you?

A. Never measured it.

Mr. FORNEY. You may state if it is not essential for the proper conduct and well-being of the post that this parade ground should be irrigated.

A. Yes, sir, it is essential for the health and comfort of the garrison that the parade ground should be irrigated and the trees should be irrigated.

Q. This parade ground is essential in carrying on your drilling and military operations?

A. Very essential.

Lieut. WALSH, after being duly sworn in behalf of the United States, testified as follows:

Examined by Mr. FORNEY:

Q. Where do you reside?

45 A. At the Boise Barracks.

Q. What official position do you hold, if any?

A. I am lieutenant, 4th Cavalry, and quartermaster.

Q. How long have you occupied that position?

A. Nearly all the time during the two years and a half.

Q. Are you acquainted with Cottonwood Creek and its course across the military reservation?

A. I am.

Q. Are you acquainted with the point known as Krall's diversion?

A. I am.

Q. You may state, if you know, to what extent the *aw*ter of Cottonwood Creek has been diverted during the summer of 1895 from reservation.

A. During the summer of 1895 the water was low in Cottonwood Creek and I inspected the creek up to the point of Mr. Krall's diversion; I found a large ditch there, carrying, I should judge, 800,000 gallons of water a day; that is merely estimated. Afterwards there was one of the soldiers sent to divert this water into its proper channel. While he was absent and supposedly making this diversion, the flow of water in the irrigating ditch to the post increased materially, and increased and diminished alternately, depending upon the whereabouts of this man. Notwithstanding all the care we took to procure water, in one row of trees 61 had died—at least 61 had died for want of water.

Q. Was this want of water occasioned by this diversion of Mr. Krall?

A. I should say it was, as the water for about two months decreased.

46 Q. You may state if it is essential for the proper conduct and for military purposes of the post that this water in Cottonwood Creek should run undisturbed across the reservation.

A. In order to strengthen the sod for troops to drill on, and prevent the barracks being in the sand, and to protect them from the dust, it is very essential that we should have water there, and the only water we can procure is that from Cottonwood Creek.

Cross-examination by Mr. MOODY:

Q. When were these trees planted, these 61 trees that you claim died?

A. I can not answer that question exactly, but they were planted by Lieut. Hart, quartermaster. I can give you the height of the trees.

Q. I just simply want to know when they were planted. Now, you stated, as I understand, that there were some months in which there was a lack of water?

A. July, August, and September.

(Endorsed:) Filed June 24th, 1896. A. L. Richardson, clerk.

Which was all the testimony taken in said action.

That on the 24th day of June, 1896, the following opinion was filed in said action:

47 In the circuit court of the United States for the district of Idaho.

UNITED STATES OF AMERICA
*vs.*
JOHN KRALL.

*Opinion.*

J. H. Forney, counsel for the United States, and Silas W. Moody, counsel for the defendant.

By the testimony and stipulated facts in this case, it appears that the military reservation at Boise was set apart as such prior to 1869, and has been so continuously occupied since 1864; that about 200 acres are level, and are and can be used for quarters, drill grounds, and other useful purposes connected with the proper use and comfort of the garrison; that as located Cottonwood Creek, by its natural channel, flows through the reservation, and from it the post is supplied with water for irrigation for the growth of trees, of grass and sod, for parade and drill grounds, and other purposes.

Defendant, in 1877, located for agricultural uses 500 inches of water from said creek, the place of diversion being a point above where the creek enters such reservation; that from said place of diversion he conducted the water to land he owns in the neighborhood; that he has since continued to use such water, and that by such use the post has been deprived of it to such an extent that at least during a portion of
48 the time there has not been sufficient for the post, and for want of it some of the trees planted have died. The Government now asks that defendant be perpetually restrained from the use of any water of such creek.

It thus appears that the Government was in possession of the reservation, and the stream running through it, long anterior to any attempt by defendant to appropriate the water, and it appears to me that the law of the case is settled by a decision of the Supreme Court which counsel seem to have overlooked.

By Sturr v. Beck, 133 U. S. 541, it appears that one Smith, in 1877, homesteaded a tract of land in Dakota, over which flowed a stream of water; that in 1880 Sturr went upon this land, located a water right, and diverted the water to his own land adjoining, whence he continued to use it until 1886, when Beck, the grantee of Smith, notified him to desist. Neither Smith nor Beck had made any location of the water, nor diverted it prior to Sturr's location thereof, which he made in accordance with the custom there existing for the location of water rights.

The court held that the land through which the stream flowed, having been located before the water right was claimed, the owner of the land, as riparian proprietor, was entitled to the water of the stream and no other person, under any subsequent claim, could divert it. In this case, treating the Government as a citizen, we find it in possession of the land through which the creek flows, and in the use of its waters, prior to any

claim for it made by defendant, and under this authority would be entitled to the use of the water. The fact of defendant's use for a long
49 period, in the absence of any consent or grant by the Government, gives him at best but a revocable license, as was said in the case above noted.

But the Government has a superior right to any which the citizen can have. Save such Indian title to the public lands as it chooses to recognize, it has such absolute title to them and the waters therein that it may do with them as it will, including their withdrawal from all claim or appropriation by the citizen, when not already granted or conveyed. In this case it did, long prior to any attempted appropriation of the water by defendant, set apart and dedicate to its special use the reservation in question. There can be no doubt that by this act, at least, the right of a riparian owner at once attached, in its behalf, to the water. But the land without the water would be useless as a military reservation; the location of the one would operate as notice of the intended use of the other. The Government is not bound any more than an individual to at once make use of all the water it expects to need, but it may from time to time increase its use as its conveniences or necessities may require. It can not be held to anticipate all its future wants and uses for the water, and give notice thereof.

The conclusion is that the Government has the absolute ownership and control of all the waters of said creek, and that defendant can have no claim thereto, nor any use thereof, except such as the Government or its authorized agents may from time to time permit. However such rule may appear, it can not, upon reflection, be considered harsh. The cause of the Government is nothing less than the cause of the people. To
50 their joint interest, that of the individual citizen must often yield. The strict rules of limitation and laches which often embarrass the citizen can not be applied to it. That it may protect the people, for which it is instituted, all statutes and rights must be liberally construed in its favor, otherwise through the neglect or oversight of its trusted agents, or the greed and rapacity of the individual citizen, its powers would often be so hampered that it would become a feeble protector of the people.

By this conclusion, the defendant may suffer, but he had long notice of the location of this reservation, and of the use by the post of the waters of this stream, and he could not avoid knowing that the water was absolutely necessary therefor. He can not complain if he is now prevented from using what he never had the right to take, and what he could know the Government was likely to need, and what it certainly contemplated using when it located the reservation. That the present commandant is doing more than has ever been done to beautify the post, as well as to make it useful and healthful for the garrison, and consequently requires more water, is greatly to his credit, and in his lawful use of all the water needed for such purposes he is entitled to the support of the courts.

In accordance with this decision, an injunction will be issued against the defendant, permanently restraining him, and all his agents, servants and representatives whomsoever, from using any of the water of such

Cottonwood Creek, or from interfering with it in its natural flow,
51 but this shall not be construed to prevent the commandant of the post from permitting such use of the water as will not, in his opinion, deprive the post of any that may be needed therefor.

Dated June 23rd, 1896.

JAS. H. BEATTY, *Judge.*

(Endorsed:) No. 121. United States circuit court, dist. of Idaho. The United States vs. John Krall. Opinion. Filed June 24, 1896. A. L. Richardson, clerk.

That said defendant objected and excepted to said opinion as error, which exception was duly allowed by the court.

And thereupon a decree in accordance with said opinion of the court in favor of the plaintiff and against the defendant was entered in said court, to which decree and the entry thereof the said defendant duly excepted, which said exception was allowed by the court.

That this bill of exceptions is settled and signed this 24th day of July, A. D. 1896.

JAS. H. BEATTY, *Judge.*

(Endorsed:) No. 121. In the United States circuit court for the district of Idaho. The United States of America, pltff., vs. John Krall, deft. Defendant's bill of exceptions. Filed July 24th, 1896. A. L. Richardson, clerk. Silas W. Moody, solicitor and counsel for John Krall, defendant.

52 In the circuit court of the United States for the district of Idaho.

UNITED STATES OF AMERICA
*vs.*
JOHN KRALL. } In equity.

*Stipulation for settlement of bill of exception.*

To the Hon. JAS. H. FORNEY,
*Attorney for said Plaintiff.*

DEAR SIR: Please take notice that I shall appear before the Hon. Jas. H. Beatty, judge of said court, at 10 o'clock a. m., July 24th, 1896, at his chambers in Boise City, State of Idaho, and ask to have the bill of exceptions (a copy of which is herewith transmitted) settled and signed by said judge in said action.

Dated July 17th, 1896.

Respectfully,
SILAS W. MOODY,
*Solicitor and Counsel for John Krall, Defendant.*

I hereby accept due service of the foregoing notice by copy this 20th day of July, A. D. 1896, and consent that said bill of exceptions may be settled and signed by said judge at the time and place in said notice stated, and waive amendments thereto on the part of said plaintiff.

J. H. FORNEY,
*U. S. Attorney.*

53 (Endorsed:) No. 121. In the United States circuit court for the district of Idaho. The United States of America vs. John Krall. Stipulation for allowance and settlement of defendant's bill of exceptions. Filed July 24th, 1896. A. L. Richardson, clerk.

In the circuit court of the United States for the district of Idaho.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
JOHN KRALL, DEFENDANT.
} No. 121. In equity.

*Assignment of errors on appeal.*

And now on this 24th day of July, A. D. 1896, came the said defendant, John Krall, by Silas W. Moody, his solicitor, and says that the decree in said cause is erroneous and against the just rights of said defendant, for the following reasons:

First. Because the evidence showed that said defendant was entitled to the use of five hundred inches of the waters of said Cotton-
54 wood Creek, in excess of fifteen irrigation inches, and to divert such excess at all times at the point of diversion mentioned in said evidence.

Second. Because the evidence showed that the defendant had lawfully appropriated five hundred inches of the waters of said Cottonwood Creek, and had used the same, for the purposes of irrigation and cultivation of agricultural crops and fruits, continuously from the year 1879 to the time of the commencement of said action, and for useful and beneficial purposes.

Third. Because the evidence showed that the plaintiff had permitted, and was permitting other persons at and before the commencement of said action to divert from said Cottonwood Creek, and above the point of diversion of defendant, and to carry off and without the limits of the Boise Military Reservation an amount of water greater than was needed for the irrigation of all the land culivated on said reservation prior to and at the time of the commencement of this action

Fourth. Because the evidence showed that an apportionment of the use and times of use of the waters of said Cottonwook Creek could be made between the plaintiff and defendant without damage to the plaintiff and with benefit to the defendant.

Fifth. Because the evidence showed that there were sufficient waters in said Cottonwood Creek to supply both plaintiff and defendant the whole of each year, except during the months of July, August and September, and by said decree defendant is restrained from the use of
55 any of said waters at all times during the year, regardless of the amount flowing in said creek.

Sixth. Because said decree deprives said defendant of the right to the enjoyment and use of said waters to which he claims title under the constitution and laws of the State of Idaho.

Seventh. Because the court erred in overruling the motion of defendant to modify the preliminary restraining order in said action.

Eighth. Because the court erred in entering a decree in favor of the plaintiff and against the defendant.

Wherefore defendant prays that the said decree be reversed and that a decree may be entered in favor of the defendant and against the plaintiff.

SILAS W. MOODY,
*Solicitor for Defendant.*

(Endorsed:) No. 121. In the United States circuit court for the district of Idaho. The United States of America, pltff., vs. John Krall, deft. Assignment of error on appeal. Filed July 24th, 1896. A. L. Richardson, clerk.

56 In the circuit court of the United States for the district of Idaho.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
JOHN KRALL, DEFENDANT. } In equity.

*Petition for appeal.*

The above-named defendant, John Krall, conceiving himself aggrieved by the decree made and entered on the 24th day of June, A. D. 1896, in the above-entitled cause, does hereby appeal from said order and decree to the United States circuit court of appeals for the ninth circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit.

Dated July 24, 1896.

SILAS W. MOODY,
*Attorney for Defendant.*

57 (Endorsed:) No. 121. In the circuit court of the United States for the district of Idaho. The United States of America vs. John Krall, deft. Petition on appeal. Filed July 24th, 1896. A. L. Richardson, clerk. Silas W. Moody, atty. for deft.

In the circuit court of the United States for the district of Idaho.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
JOHN KRALL, DEFENDANT. } No. 121. In equity.

*Order allowing appeal.*

This 24th day of July, A. D. 1896, came the defendant by his solicitor, and filed herein and presented to the court his petition praying for the allowance of a writ of appeal intended to be urged by him; praying also that a transcript of the record and proceedings and papers upon which the decree herein was rendered, duly authenticated, may be sent to the United States circuit court of appeals for the ninth judicial circuit,
58 and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of appeal upon the defendant giving bond according to law in the sum of three hundred dollars.

JAS. H. BEATTY, *Judge.*

(Endorsed:) No. 121. In the circuit court of the United States for the district of Idaho. The United States of America, pltff., vs. John Krall, deft. Order allowing appeal. Filed July 24th, 1896. A. L. Richardson, clerk. Silas W. Moody, deft's solicitor.

In the circuit court of the United States for the district of Idaho.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* JOHN KRALL, DEFENDANT. } No. 121. In equity.

*Bond on appeal.*

59 Know all men by these presents, that we, John Krall, as principal, and Adelbert C. Bellus and John C. Ruckdaschel, as sureties, are held and firmly bound unto the above-named plaintiff, the United States of America, in the full and just sum of three hundred dollars ($300.00), to be paid to the said plaintiff, the United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas, lately at a circuit court of the United States for the district of Idaho, in a suit depending in said court between the United States of America, plaintiff, and John Krall, defendant, a decree was rendered against the said John Krall, and the said John Krall having obtained a writ of appeal, and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said the United States of America, citing and admonishing the said the United States of America to be and appear at a session of the United States court of appeals for the ninth circuit, to be holden at the city of San Francisco, in said circuit, on the 23rd day of August next:

Now the condition of the above obligation is such that if the said John Krall shall prosecute said writ of appeal to effect and answer all
60 damages and costs, if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

JOHN KRALL. [SEAL.]
ADELBERT C. BELLUS. [SEAL.]
JOHN C. RUCKDASCHEL. [SEAL.]

STATE OF IDAHO, *County of Ada, ss:*

Adelbert C. Bellus and John C. Ruckdaschel, the sureties whose names are subscribed to the above undertaking, being severally duly sworn each for himself, says that he is a resident and freeholder in said county and State, and is worth the sum in said undertaking specified as the penalty

thereof, over and above all his just debts and liabilities of property exempt from execution.

ADELBERT C. BELLUS.
JOHN C. RUCKDASCHEL.

Subscribed and sworn to before me this 24th day of July, A. D. 1896.

A. L. RICHARDSON,
*Clerk U. S. District Court for Idaho.*

The foregoing appeal bond is approved this 24th day of July, A. D. 1896.

JAS. H. BEATTY, *Judge.*

(Endorsed:) No. 121. In the United States circuit court for
61 the district of Idaho. The United States vs. John Krall, deft. Appeal bond. Filed July 24th, 1896. A. L. Richardson, clerk.

In the United States circuit court of appeals for the ninth circuit.

JOHN KRALL, APPELLANT,
*vs.*
THE UNITED STATES OF AMERICA, RESPONDENT.

*Citation.*

UNITED STATES OF AMERICA,
*District of Idaho, ss:*

*To the United States (James H. Forney, United States district attorney for the district of Idaho), greeting:*

Whereas John Krall has lately appealed to the United States circuit court of appeals, ninth circuit, from a decree rendered in the circuit court of the United States for the district of Idaho in your favor, and has given the security required by law, you are therefore hereby cited and admonished to be and appear at a United States circuit court of appeals to be holden at San Francisco, California, on the 23rd day of August, A. D. eighteen hundred and ninety-six, to show cause, if any
62 there be, why the said decree should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Boise City, in said district, this 24th day of July, 1896.

JAS. H. BEATTY, *Judge.*

Due service of the foregoing citation accepted by copy this 27th day of July, A. D. 1896.

J. H. FORNEY,
*U. S. District Attorney for the District of Idaho.*

(Endorsed:) Filed July 27th, 1896. A. L. Richardson, clerk.

*Return of record.*

And thereupon it is ordered by the court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto

relating, be transmitted to the said United States circuit court of appeals for the ninth circuit, and the same is transmitted accordingly.

Test:

[SEAL.] A. L. RICHARDSON, *Clerk.*

63 In the United States circuit court, ninth judicial circuit, district of Idaho.

THE UNITED STATES OF AMERICA
*vs.*
JOHN KRALL.

*Clerk's certificate to transcript.*

I, A. L. Richardson, clerk of the circuit court of the United States in and for the district of Idaho, do hereby certify that the foregoing transcript of pages numbered from 1 to 51, inclusive, are a full, true, and correct copy of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States circuit court of appeals for the ninth circuit.

I further certify that the cost of the record herein amounts to the sum of $49.40, and that the same has been paid by the appellant.

Witness my hand and the seal of said circuit court, affixed at Boise, Idaho, this 17th day of August, 1896.

[SEAL.] A. L. RICHARDSON, *Clerk.*

64 (Endorsed:) No. 320. In the United States circuit court of appeals for the ninth circuit. John Krall, appellant, vs. The United States of America. Transcript of record. Appeal from the circuit court of the United States for the district of Idaho.

Filed August 22, 1896.

F. D. MONCKTON, *Clerk.*

65 United States circuit court of appeals for the ninth circuit.

JOHN KRALL, APPELLANT,
*vs.*
THE UNITED STATES OF AMERICA, APPELLEES. } No. 320.

*Appeal from the circuit court of the United States for the district of Idaho.*

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

Ross, circuit judge, delivered the opinion of the court:

The decision of the court below was in large measure based upon the idea that the Government, as the sovereign power, has in respect to the waters of nonnavigable streams upon the public lands a superior right to any which citizens can acquire. "Save such Indian title to the public lands as it chooses to recognize," said the court below in its opinion, "it has such absolute title to them and the waters therein that it may do with them as it will, including their withdrawal from all claim or appropriation by the citizen, when not already granted or conveyed."

That the Government, in the exercise of its sovereign power, may condemn for its uses the private property of the citizen no one will deny; but we can not at all agree that it can withdraw or take without compensation any right to the waters of a stream upon the public lands acquired by the citizen under its laws or by its sanction.

66 By the ninth section of the act of July 26th, 1866, Congress provided that "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed." (Stats., 1866, p. 253.)

But prior to the enactment of this statute it was the established doctrine of the Supreme Court of the United States "that rights of miners who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation in the region where such artificial use of water was an absolute necessity, are rights which the Government had, by its conduct, recognized and encouraged, and was bound to protect, before the passage of the act of 1866." It was so expressly held in the case of Broder v. Water Company, 101 U. S., 274, 276. And it was in that case further held that the act of July 26, 1866, was "rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one." That doctrine of prior appropriation in respect to the waters upon the public lands was in full force when, according to the record in the case at bar, the plaintiff in error went upon the public lands and appropriated for the purpose of irrigating his own land a certain amount of the water of Cottonwood Creek there

67 flowing. His appropriation was, of course, subject to the prior appropriation and use of the waters of the stream made by the Government officials for the purposes of the military post reservation, which consisted of 640 acres of land and was located on the stream in question below the point of the appellant's diversion. The military reservation was established by Presidential proclamation in January, 1868, subsequent not only to the time when the Government, by its conduct in recognizing and encouraging the local custom of appropriating the waters of the nonnavigable streams upon the public lands for agricultural and other useful purposes, had become bound to recognize and protect a right so acquired, but subsequent, also, to the passage of the act of Congress of July 26, 1866, making statutory recognition of that right and confirming the holder in its continued use. The creation of the reservation for military post purposes did not destroy or in any way affect the doctrine of appropriation thus established by the Government in respect to the waters of the nonnavigable streams upon the public lands. They continued subject to appropriation for any useful purpose. The appropriation of a part of those waters for the uses of the military post secured it in the use of the portion so appropriated, but it did not take from others the right to make such appropriation above the reservation as would not interfere with its prior

appropriation. In Sturr v. Beck, 133 U. S., 541, relied on by the court below, the appropriator entered upon the land which the grantor of the plaintiff in that suit had previously entered in the land office and to which he had acquired a vested right and took the water there flowing, which the court held was part and parcel of the entryman's land, and which the appropriator could not take. We do not think the Supreme Court
68 by that case intended to do away with the doctrine of prior appropriation, as previously recognized by its decisions and by the statute of July 26, 1866; for, in its opinion in Sturr v. Beck, it expressly referred to that statute and to the cases of Atchison v. Peterson, 20 Wall., 507, 512, and Broder v. Water Company, 101 U. S., 274, 276, the doctrine of which cases and of Basey v. Gallagher, 20 Wall., 682, in our opinion, requires a reversal of the judgment of the court below. If by the decision in Sturr v. Beck the court had intended to overrule its former decisions, it does not seem to us it would have cited them without disapproval.

The judgment is reversed and the cause remanded for further proceedings in accordance with the views here expressed.

(Endorsed:) Opinion. Filed Feb. 23, 1897. F. D. Monckton, clerk.

69 In the United States circuit court of appeals for the ninth circuit.

JOHN KRALL, APPELLANT,
*vs.*
THE UNITED STATES OF AMERICA, APPELLEES. } No. 320.

Silas W. Moody for the appellant; J. H. Forney for the appellees.
Before Gilbert and Ross, circuit judges, and Hawley, district judge.

GILBERT, circuit judge, dissenting:

The appellant and the appellee sustain to one another neither the relation of riparian proprietors nor that of locators of water rights. The appellant is not a riparian owner. He has not acquired title from the United States to any lands adjacent to Cottonwood Creek. He has gone upon the public land and has diverted from the stream, through his ditch, a quantity of water, which he has conveyed thereby to other lands. By this act he could acquire no rights against the United States. What rights he may have acquired as against other appropriators of the waters of the same creek it is not necessary to consider. The United States have, to a certain extent, recognized the rights to water by appropriation which were conferred under local laws, which rights are in some respect a departure from the doctrine of the common law respecting riparian owners, in cases where such appropriators had no title to the soil, but had applied the waters of streams upon public lands to a useful purpose,
and the courts, in construing such laws, have generally decided
70 that the first appropriator might divert water from the stream to any useful purpose, without obligation to return it to the stream. It was for the protection of rights upon the public lands such as these, that had accrued without claim to the title or entry under the land laws, that the act of 1866, section 9 of which appears in the Revised Statutes as section 2339, was enacted. But there is nothing in the statute, nor in

any decision of the courts construing the same, to uphold the doctrine that an appropriator of water upon the public lands of the United States may by virtue of such appropriation or the continued use of the water acquire rights therein adverse to the United States. It needs no citation of authorities to sustain the proposition that at the time when the land included within the military reservation was set apart by the Government for a post the United States was the sole proprietor of the land and of the water of Cottonwood Creek, which flowed through it. In so setting apart and reserving the land there was undoubtedly included in the reservation the same right to the waters of the stream which traversed it, and the same right to have the stream flow as it was accustomed to flow undiminished, that would have been conveyed to any grantee of the Government in case of a grant of these lands. The right of such a grantee has been defined by the Supreme Court in the case of Sturr v. Beck, 133 U. S., 541. In that case a homestead entryman had entered lands over which the waters of a creek flowed in its natural channel. Subsequent to his entry, and prior to his conveyance of the homestead to Beck, Sturr went upon the homestead and located a water right under the laws of Dakota, and constructed a ditch and diverted the waters of the creek to his own adjacent land. It was contended on behalf of Sturr that the doctrine of the prior ap-
71 propriation of water on the public land and its beneficial use protected him from interference as against the grantee of the homestead entryman, but the court held that the latter obtained a vested right to have the creek flow in its natural channel by virtue of the homestead entry and his possession thereunder, and that the filing of a homestead entry upon the land across which a stream of water runs in its natural channel, before a right or claim has vested in another to divert it therefrom, confers the right to have the stream continue to run in that channel without diversion. The doctrine of that decision is distinct. It announces the general principles applicable to the diversion of water from a stream upon the public lands after a homestead right has attached below upon the same stream. The fact that the point of diversion was upon the homestead itself was not taken into account. The law is announced irrespective of that fact, and the case is decided as one purely of the invasion of the water rights acquired by the homestead settler, and not as a case of trespass upon the homestead itself. I find nothing in the decision inconsistent with the three prior decisions of the same court, which were cited in the opinion with approval. The first of those cases is Atchison v. Peterson, 20 Wall., 507. In that case it was said that on the mineral lands of the public domain the doctrines of the common law concerning the rights of riparian proprietors to the use of running waters are modified, and that "the first appropriator who subjects the property to use, or takes the necessary steps for that purpose is regarded, as against the Government, as the source of title in all controversies relating to the property," and the court decided that in controversies between the first appropriator and parties
72 subsequently claiming the water, the question for determination is whether his use and enjoyment of the water to the extent of his original appropriation has been impaired by the others. In Basey v. Gallagher, 20 Wall., 670, the decision goes no further than to hold that

in the Pacific States and Territories a right to running water on the public lands of the United States for the purpose of irrigation may be acquired by prior appropriation, as against parties not having the title of the Government. In the opinion it was said: "Neither party has any title from the United States; no question as to the right of prior appropriators can therefore arise. It will be time enough to consider those rights when either of the parties has obtained the patent of the Government." The event referred to in this quotation from the opinion did not occur until the case of Sturr v. Beck. In that case the court was called upon to consider the rights of one who had obtained a patent of the Government, and I know of no way to explain away the plain import of the decision, however much its doctrine may be opposed to the trend of the decisions of the State courts in the Pacific States. In the third case, Broder v. Water Co., 101 U. S., 274, it was held that a water right and canal upon the public lands, acquired and constructed in 1853, was by the act of July 26, 1866, made paramount to the right of one who thereafter acquired the title to the lands, whether he obtained title by preemption or under the grant to the Central Pacific Railroad Company made on July 2, 1864, in which grant there was confirmed to the owners of such canals a preexisting right.

Recurring to the decision in Sturr v. Beck, it may be said that if the rights of a grantee from the United States under the public land
73 laws are as there defined, it necessarily follows that the reservation to its own use by the United States of public land which is traversed by a running stream, before any rights have accrued to divert the water from its natural channel, includes the reservation of the water and the right to have it flow as it was accustomed to flow, and that if the appellant in this case acquired by his appropriation of the waters from the creek and the diversion thereof, and the continued use of the same, any right to the water, it is not adverse to the rights of the United States, and can not affect the right of the Government to demand the unrestricted flow of the water through the reservation as it flowed at the time when it was so set apart for a military post. As against this reservation of property and the incidents thereto the appellant has acquired no rights whatever. I think the decree, therefore, should be affirmed.

(Endorsed:) Dissenting opinion. Filed Feb. 23, 1897. F. D. Monckton, clerk.

74 United States circuit court of appeals for the ninth circuit, October term, 189 .

JOHN KRALL, APPELLANT,
*v.*
THE UNITED STATES OF AMERICA, APPELLEES. } No. 320.

*Appeal from the circuit court of the United States for the district of Idaho.*

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Idaho, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed, and the cause remanded for further proceedings in accordance with the views expressed in the opinion of this court.

(Endorsed:) Filed Feb. 23, 1897. F. D. Monckton, clerk.

75 In the circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
*vs.*
JOHN KRALL, APPELLEE.

The above-named appellant, the United States of America, conceiving itself aggrieved by the order entered in said court on the 23rd day of February, A. D. 1897, reversing the decree of the United States circuit court for the district of Idaho, entered in said cause on the 24th day of May, A. D. 1896, doth hereby appeal from the said order to the Supreme Court of the United States, and prays that this its appeal may be allowed, and that the transcript of the record and proceedings and the papers upon which said order was made be duly authenticated and sent to the Supreme Court of the United States.

JAMES H. FORNEY,
*U. S. Attorney for the District of Idaho, and Counsel for Appellant.*

And now, to wit, on this the first day of October, A. D. 1897, it is ordered that the appeal be allowed as prayed for.

WILLIAM B. GILBERT,
*Circuit Judge.*

(Endorsed:) Petition for and order allowing appeal.
Filed Oct. 1, 1897. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

76 In the circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
*vs.*
JOHN KRALL, APPELLEE.

*Assignment of errors.*

Now comes the appellant upon the record and proceedings in this action, and assigns the following errors:

1. The circuit court of appeals erred in holding and deciding that an appropriator of water upon the public lands of the United States may, by virtue of such appropriation and the continued use of the water, acquire rights thereunder adverse to the United States.

2. The circuit court of appeals erred in holding and deciding that the Government, in setting apart a reservation of land for a military post, was not entitled to have the waters of a stream which traversed it flow,

as it was accustomed to flow, undiminished, in the same manner that it would have been conveyed to any grantee of the Government in case of a grant of these lands.

3. The circuit court of appeals erred in holding and deciding that the appropriation by the Government of a part of the waters for the use of a military post, secured it in the use of the part so appropriated and none other, and did not take from others the right to make additional appropriations of the remainder of the waters as against the Government.

4. The circuit court of appeals erred in reversing the judgment and decree of the court below.

Wherefore, comes now the appellant and moves to set aside and
77 vacate the decision and decree of the circuit court of appeals, and that the decree of the United States circuit court for the district of Idaho be affirmed.

J. H. FORNEY,
*U. S. Attorney for the District of Idaho, and Attorney for Appellant.*

(Endorsed:) Assignment of errors. Filed Oct. 1, 1897. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

78 In the circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
*vs.*
JOHN KRALL, APPELLEE.

On application of James H. Forney, esq., U. S. attorney for the district of Idaho, and counsel for the appellant in the above cause, it is ordered that all proceedings be stayed pending the appeal herein, and, it further appearing that the amount involved in controversy is over one thousand ($1,000.00) dollars, that no bond on appeal be required, the United States being the appellant.

WILLIAM B. GILBERT,
*Circuit Judge.*

(Endorsed:) Order staying proceedings, etc. Filed Oct. 1, 1897. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

79 United States circuit court of appeals for the ninth circuit.

JOHN KRALL, APPELLANT,
*vs.*
THE UNITED STATES OF AMERICA, APPELLEES. } No. 320.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing seventy-eight (78) pages, numbered from one (1) to seventy-eight (78), both inclusive, together with two maps, marked respectively "Exhibit A" and "Map of Post Reservation, Fort Boise, Idaho," to be a true copy of the record and of the assignments of error, and of all proceedings in the above-entitled cause, including the opinion and dissenting opinion filed, as the originals thereof remain of record in said circuit court of

appeals, and that the same constitute the transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, California, this 10th day of December, A. D. 1897.

[SEAL.] F. D. MONCKTON, *Clerk.*

80 UNITED STATES OF AMERICA, *ss:*

*To John Krall, greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of appeals for the ninth circuit, wherein the United States is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Wm. B. Gilbert, circuit judge, this 3rd day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

WM. B. GILBERT,
*Circuit Judge.*

81 DISTRICT OF IDAHO, *ss:*

On this 6 day of December, in the year of our Lord one thousand eight hundred and ninety-seven, personally appeared J. I. Crutcher, before me, the subscriber, A. L. Richardson, cl'rk of U. S. circuit court, district of Idaho, and makes oath that he delivered a true copy of the within citation to John Krall, the within-named defendant in error.

J. I. CRUTCHER,
*U. S. Marshal.*

Sworn to and subscribed the 6th day of December, A. D. 1897.

[SEAL.] A. L. RICHARDSON,
*Clerk U. S. Circuit Court for Idaho.*

(Indorsed:) United States circuit court of appeals for the ninth circuit. No. 320. John Krall, appellant, *vs.* The United States. Citation on appeal to Supreme Court of the United States. Filed December 10, 1897. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

(Indorsement on cover:) Case No. 16757. U. S. C. C. of appeals, 9th circuit. Term No. 216. The United States, appellant, *vs.* John Krall. Filed December 21, 1897. Office Supreme Court of U. S. Received Dec. 21, 1897.

# In the Supreme Court of the United States.

OCTOBER TERM, 1898.

UNITED STATES
*v.*
JOHN KRALL. } No. 216.

## BRIEF.

### STATEMENT OF THE CASE.

This is an appeal by the United States from the decision of the court of appeals for the ninth circuit, reversing the decision of the circuit court for the district of Idaho.

In the last-named court the United States filed a bill in equity praying for a perpetual injunction to enjoin Krall from diverting the waters of Cottonwood Creek and thereby preventing the complainant from enjoying the use of said waters.

It appears that long before the beginning of the acts complained of or any claim of right by the respondent, the Government had established upon public lands of the

United States a military reservation, now still maintained and used as such, and that Cottonwood Creek, then and now passing through public lands to and through such reservation, supplied water for all uses, agricultural and other, of the troops garrisoned there, and still in part supplies them.

Going upon what was and is public land higher up on the creek, the respondent diverted much of the water of it for agricultural purposes of a neighboring homestead. Of this the Government complains.

The respondent claims that he had and has a right to so divert the water, in view of a general right of all persons to appropriate water of streams on the public lands for irrigating purposes, and says the Government had abandoned its right to have the water flow as it was wont to flow, prior to the diversion.

As there is little dispute about the facts, and none about those upon which decisions have turned in the two lower courts, it seems unnecessary to go into more detail.

## ASSIGNMENT OF ERRORS.

1. The court of appeals erred in reversing the trial court and in not affirming its decision.

2. It erred in holding that the United States has not had at all times, since the reservation was established, complete common-law right and title to it, to all intents and purposes.

3. In holding that the creation of said reservation did not destroy or in any way affect, so far as this case is concerned, the application of the doctrine of appropriation of waters.

4. In holding that the Government was entitled to but a portion of the waters flowing through the reservation.

5. In holding that the doctrine of prior appropriation gave respondent a right to diminish the water flowing in Cottonwood Creek through said reservation.

6. In holding that the Government is entitled to no more than the rights of a prior appropriator under said doctrine, and no more water than it had appropriated or was using prior to the respondent's appropriation.

7. In denying to the Government common-law rights in and to water of Cottonwood Creek.

8. In ignoring the Government's rights as owner of the fee, as distinguished from its sovereign power and riparian rights.

**BRIEF.**

The opinions of the lower courts and a dissenting opinion are short and clear and conveniently present the controversy for decision by this court.

In this case we have something more than riparian ownership and riparian rights. We have an unqualified property in the soil all the way across the stream, and the water is not an appurtenance to the land, but a part of the land. It is *liberum tenementum* as fully as the earth, and if sued for at common law need no more be mentioned than would the rocks or trees growing upon the ground beside it.

An injury to this our property is what we allege, viz, the taking away of part of it.

We claim not riparian rights, but a servitude upon all lands owned above us and acknowledge a servitude upon

our land, for the greater security of the enjoyment of our freehold property, and of that of others. But as the respondent is no owner or pretended owner above us, we do not need that servitude, and simply ask that our freehold be not damaged.

It is that *servitude* of land which is described as a right to have the waters run as they are accustomed to run. The ownership of the water is a different thing, and the water, at the common law, is considered as land as to the ownership. It is owned absolutely, but the soil is subject to a servitude, and by *reason of this* the next owner below may insist that the water, however its owner may divert and use it, entering the land below shall not be diminished, or unduly increased, or enter at a new place.

But the respondent has no land under servitude, and we regard him as simply injuring our freehold by taking away *land* belonging to us. We ask that he be stopped and prevented from doing this.

That mere riparian rights may include a right to a similar flow of water may be so, but we claim more than riparian rights.

His answer is not that we had no such ownership and therefore he is not injuring us, but that we have conceded and granted to all the world for all time a right to our property comprised in the military reservation.

This granting away of the public's *land* we strenuously deny.

The act of 1866 speaks only of then vested and accrued rights.

Public lands in the West are recognized by the Constitution itself as "property" owned by the United States.

Innumerable statutes and decisions have treated it as owned by the common-law title and not solely by a "sovereign" title, whether in a Territory or a State.

When any of it is, by any proper officer, separated from the public domain and devoted to uses identical with those to which individuals put land, *ipso facto* all of a private owner's rights are asserted.

Without such alteration those rights exist, and when the Attorney-General relies upon any of them to redress any injury or quiet title to the public domain the courts recognize it as existing. The Attorney-General's office is bodily taken from the British Government, and the Attorney-General is the proper organ of the Government by which the Government claims such rights, and, in the absence of positive law to the contrary, they should be recognized by the courts whenever he determines that they are important to the Government's interests.

He can make entry for breach of condition subsequent where the Government has that right. Why should he not have sufficient authority to assert the common-law rights of the Government in such a case as this? *U. S.* v. *Parrott et al.* (1 McAll, 271, 320).

Unless, therefore, the common-law rights of the Government were, by the statute of 1866, actually granted away for all time to all comers, under all circumstances, in regions where agricultural irrigation happens to be practiced and local custom acknowledges superiority of water right from priority of possession, we think that this

court should have no hesitation in protecting from intrusion and injury the Government's property here, as it would that of any individual owner asserting rights which he has always possessed and has been asserting and using.

What the act of 1866 says is that wherever a water right has accrued by priority of possession, and the same is recognized by local custom, law, and courts to be such a right, the owner of such right so recognized shall be maintained and protected in the enjoyment of the same.

Thus far evidently a right *of a kind* previously existing, or what the local custom and decisions recognized as a right, and such a right already *vested and accrued*, is the sole subject of the statute.

The owner of that is to be protected and maintained *in the same*—that is, in the enjoyment of it.

The other sections of the law show *from whom* and by whom he is to be protected, for it is a law first opening to general exploration and occupation the *mineral lands* of the United States, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of *miners* in the several mining districts, not in conflict with the laws of the United States; also giving State and Territorial legislatures the right to make rules as to "easements," etc., and other means to complete the development of *mines;* in other words, giving rise in many ways to possible controversies with individuals and possible interfering proceedings, involving the enjoyment of this water right.

But, manifestly, no grant of any new right, unknown and unacknowledged, is made.

What, then, was the right already recognized and acknowledged by custom and courts?

It was a right as against individuals, arising from priority of possession—priority over other possessions.

No custom or court had recognized or pretended to recognize any right as against the Government—the owner—arising from priority of possession over its possession or otherwise.

As between themselves, prior in time, prior in right, was the usual statement of the principle which the Federal courts—the owner's courts—were now enabled to recognize in controversies between individuals. See also act of February 27, 1865.

And this court has held, as to the next clause of section 9, that no new independent kind of right to ditch on the public lands is intended to be granted whenever the former right may exist or be recognized, but that when the local custom and decisions also recognized a right of way over the public lands of the United States, as they did a water right, this so-called right, so recognized by custom and law, is *acknowledged* and *confirmed*, with a proviso. But this also was a right as between individuals only, and was also vested and accrued, for it was merely acknowledged and confirmed.

So that, in both cases, we have the Government acknowledging and safeguarding already existing rights, or so-called rights, as they existed or were recognized as existing, and not granting *new* or *different* ones.

These *previously recognized* rights included no right to prevent the United States Government from the enjoyment of its own property as it might see fit.

Because they did not, and were not changed or enlarged in any way by the acknowledgment of them for the first time and the protection thrown around them by the act of 1866, it follows that they diminished in no degree whatever the owner's rights as owner.

The owner could, as between trespassers or licensee occupants, acknowledge that one, in relation to the other, had the better rights, and, being a *government*, it could solemnly enact that those rights should be respected by all persons who might be tempted to deny or dispute them, without parting in the slightest degree with its right to the lands as *owner*.

This is precisely what the act of 1866 carefully does. This is the meaning of its words, and they seem to be clear. But if there is any doubt, and they are at all capable of such a construction, then, upon well-settled principles repeatedly affirmed by this court, they must not be construed as taking away the public rights of ownership.

That it was part and inseparably part of the "right" recognized to ignore the previously existing common-law rights of any individual is not apparent to our minds, either as matter of history or logic.

That Congress would be acting badly to suddenly exercise all its rights, notwithstanding the hardships and disappointments thereupon ensuing, may or may not be so; but that it has all the rights of a common-law owner and has not abandoned or otherwise lost any of them remains true.

The courts could not prevent any exercise of those rights, whether unfairly or otherwise.

Now, if the rights exist in full, what is the situation here?

The reservation preceded any act by any water taker, and if it carried with it the full rights of the Government, no one was injured or disappointed thereby.

The reservation was an act of the Government impliedly authorized by Congress, and of as high character and validity as an act of Congress.

What was done in making it was done by the sovereign will of the Government, as much as was the passing of the act of 1866.

By that reservation, the land with all rights attaching to it, were by the Government taken out of the public lands and put to a use inconsistent with an intent to leave unexercised its common-law rights.

By the same will which enacted the law of 1866—that of the owner and Government—its common-law rights were asserted and exercised, and for the future, asserted to be exercised.

And this, without impairing any right or pretended right of any one.

Could an irrigating ditch be constructed over the reservation under the act of 1866?

This will not be contended, for it is not public land.

How, then, can the water upon them be taken out of them?

We have shown that it belongs to the Government and have shown that the Government claimed its rights.

Is the land *not* public land, but the water on it public land?

If the Government had the common-law right all the time to all public lands, and never abandoned it, the most that can be claimed is that it did not exercise what nevertheless it had. And it did not exercise it, in the opinion of this court, because, being the sole proprietor of public lands, whether bordering on streams or not, there was no occasion for the vigilant exercise of its right as full common-law proprietor.

Without any new legislation, however, and simply because there arises an occasion for it to exercise it, the reason for the nonexercise or neglect ceases and the right comes into play.

The occasion arose in this case quite as obviously as it did in *Sturr* v. *Beck*.

When there are facts calling for the application of the doctrine of common-law ownership the owner of the land can demand its application, and there is nothing in the act of 1866 to prevent the Government's vendee, and, *a fortiori*, nothing to prevent the Government from asserting that principle.

The President, and now the Attorney-General, both speaking, and amply empowered to speak, as the Government, have asserted common-law rights.

Could a vendee get a right which the Government could not give him, because it no longer had it, or can he make a claim to the application of *doctrines* which the Government can not make?

Does not the amendatory act of July 9, 1870, contain an affirmation that the Government still has the complete common-law title to all lands, and can convey it to others, when it says that it intends to patent and

homestead lands subject to *vested and accrued* water rights which may *have been* (meaning before patent or homestead) acquired?

If all its own lands were held by a title from which common-law rights were eliminated by abandonment, how could it give a patentee any such rights so as to prevent *future* water appropriators from interfering with him?

Water does not rise above its source, nor common-law rights above theirs.

And if this court had practically affirmed such abandonment in 20 Wallace, 507, why should it say in 20 Wallace, 670, that it would reserve for future determination whether any right as against the Government existed?

Neither this court nor Congress understood that the Government had abandoned any rights of its own, and in Sturr *v.* Beck this court has decided, as we understand, the contrary.

We do not need to discuss or deny the right of the appellee as against the other people taking water from Cottonwood Creek, arising from priority over their possession; but certainly the supposed rights of the Government, at the reservation, to the water which is part of it, can not be denied because it owns public land above the reservation. They could only be denied by reason of the existence of an inconsistent right in some other party, not by showing other rights existing in the Government.

Can it have been intended by the legislation of Congress that one man, at the source of a long stream whose banks are occupied by a hundred homesteaders, should

come upon the scene after them and divert the whole stream? Is it not enough that Congress was willing to give preference to miners and irrigators, without absolutely ignoring all other classes of people—herders and home makers and town builders and tillers of the soil without irrigation? Is it not enough that subsequent patents and homesteads are all subordinated to prior appropriations?

The last clause of section 9, act of 1866, and the act of 1870, show that Congress took no such view of the matter; but sought to do the best it could for necessarily conflicting interests. If what it did was unwise or insufficient, the courts are not authorized to improve it, and Congress still lives. Those laws grew out of a continuing custom, but acknowledged and protected only "vested and accrued" rights under it—vested in 1866 or vested in a given case before patent, preemption, or homesteading. Both acts treat the Government title as a common-law title, and patent was to be issued subject to *specified conditions*, but giving a common-law estate. If the act of 1866 meant a general abandonment of Government rights, what was the need to amend it, as was done in 1870? It is proposed here to have the courts further amend it to cover cases not covered by the amendment of 1870.

No custom of any kind is proven to have existed, and the laws of Idaho of 1881 contain no assertion of a right of a prior appropriator of water except distinctly "as between appropriators."

We do not understand that it is quite the same thing for Congress to say what shall be law when a state of

facts is brought about by "local custom, laws, and decisions of courts" and to say that the people of Idaho Territory may make laws taking away rights belonging to the Government of the United States in trust. But aside from the absence of intent to make such a delegation of power, and its questionable validity, if intended, what have we in the laws of Idaho enacting that, as against other people than subsequent appropriators, the appropriation of water can take place?

The statute of Idaho (of 1881) does not say that, but that "as between appropriators, the one first in time is the first in right."

It does not say that common-law rights are of no account in Idaho, as against him who proposes first to appropriate water.

The common law is expressly adopted in Idaho "so far as it is not repugnant to or inconsistent with the Constitution or laws of the United States." (R. S. of Idaho, sec. 18.) The case of *Drake* v. *Earhart* (2 Idaho, 723) is not in point to show that no common-law ownership of the water exists, but only that prior appropriation is good diminution of its flow.

Is the Government to be the only sufferer in Idaho, not from the customs and laws prevailing there, but because of some meaning attached to the act of 1866, not suggested by anything which appears on its face?

Respectfully submitted.

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# Supreme Court of the United States.

**October Term, 1898.**

*No. 216.*

**THE UNITED STATES, Appellant,**

**vs.**

**JOHN KRALL.**

*Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.*

## BRIEF OF APPELLEE.

The facts in this case are undisputed, having been stipulated in the trial of the case in the Court below. (Transcript, p. 12.) The United States was and is the owner of the military reservation referred to, as also the unsurveyed public land at a point on which appellee diverts water from said Cottonwood Creek for purposes of irrigation. The military reservation was set aside by executive order dated April 9th, 1873. Appellee appropriated the waters of Cottonwood Creek above the military reservation in the year 1877 and diverted them through a ditch to his lands, where they have since been used for the purpose of irrigation.

Appellant contends, on behalf of the government,

that appellee acquired no rights, as against the United States, by his appropriation and diversion of the water in 1877 and the continued use thereof for the purpose of irrigation since that time, but maintains that the United States, being the sovereign proprietor of the lands embraced in the reservation, and of the water flowing through the same, is entitled to have said water flow in its natural channel "undiminished in quantity and unimpaired in quality." In other words, appellant asserts what is commonly known as the doctrine of riparian rights with respect to its reservation Appellee denies that such doctrine, or rule of law, applies to said lands and asserts his right to the use of the waters of said stream as a prior appropriator under the laws of the State and Territory of Idaho as well as the laws of the United States. Happily all other questions of law and fact are eliminated from said case.

In behalf of appellee it is contended:

1st. That the local laws, customs and regulations, from the organization of the Territory of Idaho until the present time, have recognized, encouraged and permitted the appropriation and diversion of water from its natural course for the purpose of the irrigation and reclamation of arid lands; and that the so-called doctrine of riparian rights, so far as the same is in conflict with this rule, has never been recognized.

Black's Pomeroy on Water Rights, Sec. 15, *et seq.*

Drake vs. Earhart, 2d Idaho, 720-722.

2d. The right of appropriation of the waters of the arid regions, for the purposes of irrigation, has been recognized and confirmed by the courts of all the States and Territories embraced within that area, both State and Federal, and by the Supreme Court of the United States, as well as by the acts of Congress. This course was forced upon the courts and on Congress from the very necessities of the situation, for without the adoption of such a rule the arid areas were not capable of settlement and cultivation.

Black's Pomeroy on Water Rights, Secs. 15, 16, 17 and 120.

Kinney on Irrigation, Secs. 96-111.

Gould on Waters (1883), Sec. 228.

Bear River, etc., Mining Co. vs. New York Mining Co., 8 Calif., 327.

Broder vs. Natoma Water Co., 101 U. S., 274.

Basey vs. Gallagher, 20 Wall., 670.

Atchison vs. Peterson, 20 Wall., 507.

Jennison vs. Kirk, 98 U. S., 460.

Act of July 26, 1866, R. S. U. S., Sec. 2339, 14 Stat. at Large, U. S., 253.

Act of July 9, 1870, 16 Stat. at Large, 218, R. S. U. S., Sec. 2340.

3d. Appellee's rights to the waters of Cottonwood Creek attached in 1877, when he made his water filing and appropriation, subject only to the prior right, by appropriation, of a limited amount

made by the United States for irrigating a small portion of the reservation.

Drake vs. Earhart, 2 Idaho, 720-721.

Black's Pomeroy on Water Rights, Sec. 55.

Becker vs. Marble Creek Irrigation Co., 15 Utah, 225 (49 Pac., 892).

Low vs. Schaffer et al., 33 Pac. Rep., 678 (Calif).

Saint vs. Guerrerio, 30 Pac. Rep., 335 (Colo. Sup).

Union Mill Co. vs. Dangberg, 81 Fed. Rep., 73.

4th. Appellee concedes that the United States, being the sovereign owner of the lands embraced in the military reservation as well as the waters naturally flowing through the same, had a right to restrain and prevent the diversion of said waters from their natural course; but the appellee contends that this right of a sovereign riparian proprietor has been waived, surrendered and abandoned by the United States.

Propositions one, two and three involve questions largely elementary, but they are stated for the reason that they lie at the foundation upon which the title of the appellee rests.

Proposition No. 4 is the gist of this action and involves the essentials upon which this case rests. If appellee is right in his statement of it, the decision of the Circuit Court of Appeals must necessarily be affirmed. The question involved is one of momentous concern to the people of the entire arid

region of America. If the position taken by the government is sustained, it means that the old doctrine of riparian rights is affirmed in a section of the country where it is not applicable. Some of the cases in the State and Federal courts where this question has been discussed will now be referred to.

On the 26th day of July, 1866, an act was passed by Congress suspending the old doctrine of riparian proprietorship, so far as the United States was concerned, in its public lands, the ninth section of said act was as follows:

"That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes herein specified, is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

14 Stat. at Large, 253, R. S. U. S., Secs. 2339-2340.

In Jennison vs. Kirk, 98 U. S., 456, Mr. Justice Field, speaking for the Court, said:

"Here, also, the first appropriator of water to be conveyed to such localities for mining or other ben-

eficial purposes, was recognized as having, to the extent of actual use, the better right. The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains. The waters of rivers and lakes were, consequently, carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through canons and ravines, to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist, from their obvious justness, for the security of these ditches and flumes, and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the State courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years, from 1848 to 1866, the regulations and customs of miners, as enforced and molded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands. Until 1866, no legislation was had looking to a sale of the mineral lands. The policy of the country had previously been, as shown by the legislation of Congress, to exempt such lands from sale. In that year the act, the ninth section of which we have quoted, was passed."

Justice Field, in giving the reason for the passage of the act of July 26th, 1866, in said decision further said:

"Whilst acknowledging the general wisdom of

the regulations of miners, as sanctioned by the State and molded by its courts, and seeking to give title to possessions acquired under them, it must have occurred to the author, as it did to others, that if the title of the United States was conveyed to the holders of mining claims, the right of way of owners of ditches and canals across the claims, although then recognized by the local customs, laws and decisions, would be thereby destroyed, unless secured by the act. And it was for the purpose of securing rights to water, and rights of way over the public lands to convey it which were thus recognized, that the ninth section was adopted, and not to grant rights of way where they were not previously recognized by the customary law of miners. The section purported in its first clause only to protect rights to the use of water for mining, manufacturing, or other beneficial purposes, acquired by priority of possession, when recognized by the local customs, laws and decisions of the courts; and the second clause, declaring that the right of way for the construction of ditches and canels to carry water for those purposes 'is acknowledged and confirmed,' can not be construed as conferring a right of way independent of such customary law, but only as acknowledging and confirming such right as that law gave. The proviso to the section conferred no additional rights upon the owners of ditches subsequently constructed; it simply rendered them liable to parties on the public domain whose possessions might be injured by such construction. In other words, the United States by the section said, that whenever rights to the use of water by priority of possession had become vested, and were recognized by the local customs, laws and decisions of the courts, the owners and possessors should be protected in them; and that the right of

way for ditches and canals incident to such water-rights, being recognized in the same manner, should be 'acknowledged and confirmed.'"

In Broder vs. Water Co., 101 U. S., 274, the Court, speaking by Mr. Justice Miller of the same section, said:

"It is the established doctrine of this Court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, before the passage of the act of 1866 and that the section of the act which we have quoted was rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one."

And in that case it was held that rights acquired by appropriation before the passage of the act were protected as against one who obtained title of the land from the government after its passage.

It has also been held that where rights to water were acquired by appropriation after the passage of the act of 1866, they were valid and must be protected against one who subsequently obtained title to the land from the government.

De Necochea vs. Curtis, 20 Pac. Rep., 563.

Citing—

Osgood vs. Mining Co., 56 Cal., 571.

Farley vs. Land Co., 58 Cal., 142.
Himes vs. Johnson, 61 Cal., 259.
Judkins vs. Elliott, 12 Pac. Rep., 116.
Ware vs. Walker, 70 Cal., 591 (12 Pac. Rep., 475).

In the case of Bear Lake and River Waterworks and Irrigation Co. vs. Garland, decided October 19, 1896, 17 Sup. Ct. Rep., 12, Mr. Justice Peckham, speaking for the Court and referring to this statute, says:

"So far as the public land is concerned, over or through which these ditches for the canal were dug, the statutes above cited create no title, legal or equitable, in the individual or company that simply takes possession of such land. The government enacts that any one may go upon its public lands for the purpose of procuring water, digging ditches for canals, etc., and when rights have become vested and accrued, which are recognized and acknowledged by the local customs, laws and decisions of courts, such rights are acknowledged and confirmed."

Professor Pomeroy, in his work on Water Rights (1893), Sec. 17, referring to this statute, says:

"The right of property thus settled by State courts availed against all persons except the United States government. This limitation was soon removed. The United States government recognized the right to water on the public domain, thus acquired by prior appropriation, as a substantial and valid right which the government was bound to acknowledge and protect; and it repeatedly approved and adopted the doctrine which had sprung from

the mining customs and been settled by the State and Territorial decisions. Citing Broder vs. Natoma Water Co., 101 U. S., 274; Basey vs. Gallagher, 20 Wall., 670; Atchison vs. Peterson, *Id.*, 507. This view was expressly confirmed by a statute of Congress passed July 26, 1866. (R. S. U. S., Sec. 2339.) * * * * This statute, it is held by the United States Supreme Court, does not create the right; but it is 'rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one. Citing Broder vs. Natoma Water Co., *supra.*"

In Atchison vs. Peterson, 20 Wall., 507, a Montana case, Mr. Justice Field said:

"By the custom which has obtained among miners in the Pacific States and Territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or to use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of the miners, and inadaquate to their protection. By the common law the riparian owner on a stream, not navigable, takes the land to the center of the stream, and such owner

has the right to the use of the water flowing over the land as an incident to his estate."

* * * * * * * * * * * * * *

"This equality of right (at the common law) among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrines of riparian proprietorship with respect to the waters of those streams.

"The government, by its silent acquiescene, assented to the general occupation of the public lands for mining, and to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated, and open to general exploration, does in natural justice acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific States and Territories, by their customs, usages, and regulations, everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories."

He quotes from some of the early California decisions hereinbefore cited, and further says:

"This doctrine of right by prior appropriation was recognized by the legislation of Congress in 1866. (Quoting the statute of Congress.). The

right to water by prior appropriation, thus recognized and established as the law of miners on the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made."

In the case of Basey vs. Gallagher, 20 Wall., 671, the same doctrine was applied by the United States Supreme Court to all other beneficial purposes for which water is essential, as well as to mining. Mr Justice Field, after quoting the decision in Atchison vs. Peterson, said:

"The views there expressed and the rulings made are equally applicable to the use of water on the public land for purposes of irrigation. No distinction is made in those States and Territories by the customs of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one."

He quotes an early California decision to this effect (Tartar vs. Spring V. M. Co., 5 Cal., 397), and proceeds:

"Ever since that decision it has been held generally throughout the Pacific States and Territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection."

Continuing, he said:

"The act of Congress of 1866 recognizes the right to water by prior appropriation for agricultural and manufacturing purposes as well as for mining. * * * It is evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the

use of water, which had grown up among the occupants of the public land under the peculiar necessities of their condition."

Professor Pomeroy, in his work above referred to, Sec. 25, after a detailed reference to this decision of the United States Supreme Court and of the various State courts on this question, concludes as follows:

"Where a stream or lake was throughout its entire extent on the public land, the prior appropriator obtained a right, we have seen, good against all the world except the Federal Government. The government might have denied this right and treated it as non-existing. On the contrary, Congress formerly acknowledged it, and by the declaratory statute of 1866 made the national ownership of the public domain bordering on the stream or lake subject to the claims and uses of the prior appropriator."

In the case of Silver Peak Mines vs. Valcalda, 79 Fed. Rep., 890, Judge Hawley, referring to this statute, says:

"In so far as the laws of the United States had any application to this case, the plaintiff's right to the water of the springs, acquired under the local customs, laws and decisions of the courts, are recognized by the provisions of Section 2339 of the Revised Statutes."

This question has been repeatedly passed upon by the State courts, and in every instance where it has been raised on the Pacific Coast, the section of the country to which the act of 1866 was applicable and for which it was passed, the decisions have

been in accordance with the Federal decisions just quoted. In a very recent case, decided March 15, 1898, Carson vs. Gentner, 52 Pac. Rep., 507, the Supreme Court of Oregon, says:

"The doctrine of the common law, that the waters of a stream must continue to flow in its natural channel, undiminished in quantity and unimpaired in quality, has been very much modified in the territory embraced in the Pacific Coast States, where a new rule founded upon the necessities under which the early settlers labored, has been inaugurated. So much, only, of the common law was adopted by these settlers as was applicable to the condition of the country in which their lot was cast; and, realizing that water is a powerful agent in separating the precious metals from the baser materials in which they are embedded, and also serves when used in irrigating arid tracts, to cause the desert to bud, blossom, and bear fruit, and that without the use of such water a vast region must forever remain valueless and uninhabited, necessity compelled these primitive law-givers to adopt for their government a code of customs which prescribed the extent of public land each was entitled to, and regulated the manner of appropriating water to the operation of mines and the cultivation of farms, orchards, and vineyards. This latter custom provided that he who first changed the course of a natural stream flowing through public lands, which at the time was common to all, and appropriated the water so diverted to some useful purpose, thereby acquired a superior right to continue the use thereof against every claimant except the United States. The justice of this custom was recognized by the courts, which enforced its provisions in opposition to the doctrine of the common

law; and the legislative assemblies of these States, following the example set by the courts, have passed in many instances acts guaranteeing protection to prior appropriators in their possessory rights in the diversion of water against all claimants except the sovereign."

After referring to the act of 1866, the Court says:

"It has been repeatedly held that the provisions of the section just quoted only confirm to the owners of ditches and water-rights on the public domain the same privileges which they enjoyed under the local customs, laws, and decisions of the courts prior to its pasage. Citing Atchison vs. Peterson, 20 Wall., 507; Basey vs. Gallagher, 20 Wall., 670; Jennison vs. Kirk, 98 U. S., 453; Broder vs. Water Co., 101 U. S., 274."

The Oregon Court quotes approvingly the very cogent reasoning of Mr. Justice Ross in his dissenting opinion in the case of Lux vs. Haggin (69 Cal., 255), as follows:

"No valid reason exists why the government, which owned both the land and the water could not do this. It thus became, in my judgment, as much a part of the law of the land as if it had been written in terms in the statute books, and in connection with which all grants of public land from either government should be read. In the light of the history of the State, and of the legislaton and decisions with respect to the subject, is it possible that either government, State or National, ever contemplated that a conveyance of 40 acres of land at the lower end of a stream that flows for miles through public lands should put an end to subsequent appropriation of the waters of the stream

upon the public lands above, and entitle the grantee of the 40 acres to the undiminished flow of the water in its natural channel from its source to its mouth? It seems to me entirely clear that nothing of the kind was ever intended or contemplated."

The Oregon case above referred to quotes the decision of the Circuit Court of Appeals in the case at bar approvingly, and sustains the position taken by a majority of the Court in this case.

In the case of De Necochea vs. Curtis (Cal.), 22 Pac. Rep., 199, referring to a recognition of this right on the part of the Federal Government, it is said:

"In the absence of such adverse claim his right is perfect, for the owner of the soil—the United States—has recognized and confirmed it, and has declared that all subsequent purchasers must take subject to it."

To the same effect are Jacob vs. Lorenz, 33 Pac. Rep., 119 (Cal.); Isaacs vs. Barber, 38 Pac Rep., 873 (Wash.).

In the case of Williams vs. Harter, decided May 31, 1898, 53 Pac. Rep., 407, the Supreme Court of California, says:

"All public lands are open to occupation and settlement by citizens of the United States, and the law is settled that the water flowing from springs on public lands may be diverted to other public lands, and there used for irrgation or other necessary purposes, and a right to the same acquired as against any one who subsequently obtains title to the land on which the springs are situated. Citing De Necochea vs. Curtis, 80 Cal., 397 (20 Pac.,

563); Ely vs. Ferguson, 91 Cal., 187 (27 Pac, 587)."

In the opinion of the trial Court (see Transcript, page 22) the learned Judge bases his decision on the case of Sturr vs. Beck, 133 U. S., 541, and Justice Gilbert, of the Circuit Court of Appeals, in his dissenting opinion (Transcript, page 31), likewise bases his conclusions on the same case.

The trial Judge makes no reference to the act of 1866, and Justice Gilbert, in referring to it, says:

"But there is nothing in the statute, nor in any decision of the courts construing the same, to uphold the doctrine that an appropriator of water upon the public lands of the United States may by virtue of such appropriation or the continued use of the water acquire rights therein adverse to the United States." (Transcript, pages 31-32.)

It must be apparent that the learned Judge has failed to correctly interpret the ninth Section of the Act of 1866, and of the decisions of the courts with reference to the same above referred to. The United States, being the sovereign owner of the military reservation in question, clearly had the right to exact that the waters flowing thereon should remain in their natural channel undiminished in quantity. This was an attribute of sovereign owenership in the soil, but it possessed the same attribute with respect to the public lands generally. It manifestly will not be seriously contended that the executive order of 1873, setting aside these lands as a military reservation, could in

any way change their *status* with respect to the act of 1866 regarding riparian ownership.

Congress alone can provide for the disposition of the public lands together with any incident thereto, such as the flow of natural streams thereon. Congress yielded and surrendered this riparian incident of sovereign proprietorship by the ninth Section of the Act of 1866. The executive order of 1873 could not restore this attribute, nor does it pretend to. It is absurd to contend that it could. This military reservation, therefore, occupied exactly the same *status* with respect to this question that all other public lands did. The appellee's rights to the use of this water attached in 1877. Congress had surrendered the right of riparian proprietorship to these lands by the act of 1866. The appellee, therefore, had the same right to appropriate the unappropriated waters of this stream as had any other citizen, or as had the government itself.

In the case of Sturr vs. Beck, relied on by the appellant, the appropriator entered upon the land of the grantor of the plaintiff, which had been previously filed upon under the land laws of the United States, and took the water thereon flowing, which the Court held was an incident to the entryman's land and which the appropriator could not take. The Supreme Court in that case manifestly did not intend to restore the doctrine of riparian rights and to nullify the doctrine of prior appropriation recognized by the act of 1866. This conclusion is apparent for the reason that the Court, in Sturr vs. Beck, refers to that statute and quotes approvingly

the cases of Atchison vs. Peterson, 20 Wall., 507; Broder vs. Water Co., 101 U. S., 274, and Basey vs. Gallagher, 20 Wall., 682. The rule laid down in all of these cases is plainly a recognition of the doctrine of prior appropriation as set forth in the act of 1866, and clearly in contravention of the doctrine of riparian rights. To sustain the opposite contention the court must, of necessity, have reversed the three cases just referred to.

Moreover, the case of Sturr vs. Beck went up from the Territory of Dakota, where the doctrine of prior appropriation was not in existence at that time, at least as it existed throughout the arid States and Territories of the west generally.

The Supreme Court of Utah, in the case of Stowell vs. Johnson (26 Pac. Rep., 291), refers to the case of Sturr vs. Beck, and clearly shows that it is not capable of the construction contended for by appellant, and that it grew out of local physical conditions and a peculiar statute of Dakota not found elsewhere throughout the arid States. We quote from this decision, as follows:

"Riparian rights have never been recognized in this Territory, or in any State or Territory where irrigation is necessary; for the appropriation of water for the purpose of irrigation is entirely and unavoidably in conflict with the common law doctrine of riparian proprietorship. If that had been recognized and applied in this Territory, it would still be a desert; for a man owning ten acres of land on a stream of water capable of irrigating a thousand acres of land or more, near its mouth, could prevent the settlement of all the land above him. For

at common law the riparian proprietor is entitled to have the water flow in quantity and quality past his land as it was wont to do when he acquired title thereto, and this right is utterly irreconcilable with the use of water for irrigation. The Legislature of this Territory has always ignored this claim of riparian proprietors, and the practice and usages of the inhabitants have never considered it applicable, and have never regarded it. So with Colorado, early in its history, by a decision of its highest court, it was set aside. Youker vs. Nichols, 1 Colo., 551. But defendants contended that their right to have water flow in Canfield Creek, as it was wont to when their grantors and predecessors in interest acquired title to the land, is a vested right, and is not a rightful subject of legislation. In this arid country, that must remain a desert without the use of water for irrigation, if anything is a rightful subject of legislation it is the ownership of the water, and use and appropriation of the waters of the running streams for irrigation and domestic use. In support of their contention, the defendants cite Sturr vs. Beck, 133 U. S., 541. That decison was made in an appeal from the Supreme Court of the Territory of Dakota, where the statutes and climatic conditions are very different from those in this Territory. The full force and pith of the opinion is found in its concluding paragraph: 'Thus under the laws of Congress and the Territory, and the applicable custom, priority of possession gives priority of right. The question is not as to the extent of Smith's interest in the homestead, as against the government, but whether as against Sturr, his lawful occupancy, under the settlement and entry, was not a prior appropriation which Sturr could not displace.' We have no doubt it was one of the statutes of Dakota upon which this decision was

made, and it is as follows: 'Sec. 255 (Civil Code). The owner of land owns water standing therein, and flowng over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature, over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same.' How unlike this statute is, to the whole course of legislation in this Territory in reference to water-rights. Our views are supported by Pomeroy on Rip. Rights, Sec. 105."

In conclusion, appellee presents a proposition, which, so far as he has been able to learn, has not been passed upon by the Federal Courts.

He contends that the right of appropriation of the natural waters of the streams of this State and Territory has been recognized by the courts and the acts of the Legislature from the beginning, and that Congress, in admitting the State into the Union, ratified the laws and Constitution of the State recognizing the right of prior appropriation, thereby surrendering the government's rights as a riparian proprietor.

The Revised Statutes of Idaho applicable to this question, and which were in force prior to the adoption of the State Constitution, are as follows:

Sec. 3155. "The right to the use of running water flowing in a river, or stream, or down a canon or ravine, may be acquired by appropriation."

Sec. 3156. "The appropriation must be for some useful or beneficial purpose, and when the appro-

priator or his successor in interest ceases to use it for such a purpose, the right ceases."

Sec. 3159. "As between appropriators, the one first in time is the first in right."

Section 3160 specifies the manner in which this right of appropriation must be exercised, requiring certain formalities as to notice, etc., but the stipulations in this case make the recital of this unnecessary. (Transcript, p. 14.)

Section 3165, originally enacted in 1881, is as follows:

"All ditches, canals, and other works heretofore made, constructed, or provided, by means of which the waters of any stream have been diverted and applied to any beneficial use, must be taken to have secured the right to the waters claimed, to the extent of the quantity which said works are capable of conducting, and not exceeding the quantity claimed, without regard to or compliance with, the requirements of this chapter."

We quote from Article 15 of the Constitution of the State respecting water rights:

Sec. 1. "The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental, or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the State in the manner prescribed by law."

Sec. 3. "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied. Priority of

appropriation shall give the better right as between those using the water." * * *

Sec. 4. "Whenever any waters have been, or shall be, appropriated or used for agricultural purposes, under a sale, rental, or distribution thereof, such sale, rental, or distribution shall be deemed an exclusive dedication to such use; and whenever such waters so dedicated shall have once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with a view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors or assigns, shall not thereafter, without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law."

Section 1 of the Act admitting Idaho into the Union as a State, is as follows:

"That the State of Idaho is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects whatever; and that the Constitution which the people of Idaho have formed for themselves be, and the same is hereby accepted, ratified, and confirmed."

The concluding section of said enabling act is as follows:

"And all laws in force made by said Territory, at the time of its admission into the Union, shall be

in force in said State, except as modified or changed by this act or by the Constitution of the State."

Act of July 3, 1890, Sup. R. S. U. S., Vol. 1, 765, 26 Stat., 215.

Appellee contends that the provisions of the admission act above quoted, accepted, ratified and confirmed the Constitution and laws of the State of Idaho then in force, and that said admission act specially provided that such Constitution and laws should remain in force. It must be manifestly apparent from the foregoing decisions that the Constitution and laws of the State of Idaho, as well as the laws of the Territory of Idaho, above quoted, and which were continued in force upon the admission of the State, had all recognized the right of appropriation of the natural waters of the State, and that the old doctrine of riparian rights was distinctly and clearly abrogated.

In the admission act above referred to, Congress made large donations of the public domain to the new State for educational and other purposes. As Congress has the exclusive right to dispose of the public domain, and as that right was specially exercised in the admission of this State, it must be apparent that Congress likewise had a right to yield and surrender any mere incident to the public domain, such as the right to have the waters of natural streams flow in their natural channels. In the admission act confirming and ratifying the laws and Constitution of the State, all of which abrogated the doctrine of riparian rights, the government of

necessity must have surrendered its riparian rights with respect to its public lands generally within this State, including the tract in question. This is the only conclusion which can be arrived at when we consider the plain provisions of the admission act.

For the foregoing reasons, the appellee asks that the decision of the Circuit Court of Appeals be affirmed and that the injunction heretofore issued in said case may be dissolved.

Respectfully submitted,

EDGAR WILSON,

*Solicitor for Appellee.*

# UNITED STATES v. KRALL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 216. Argued and submitted April 3, 1899. — Decided May 15, 1899.

On its face the decree of the Circuit Court of Appeals in this case is not a final judgment, and the appeal must therefore be dismissed.

THE case is stated in the opinion.

*Mr. Charles W. Russell* for appellants. *Mr. Solicitor General* was on his brief.

*Mr. Edgar Wilson* for appellee.

MR. JUSTICE WHITE delivered the opinion of the court.

The United States alleged in its bill substantially as follows:

That in July, 1864, in Boise County, Territory of Idaho, (now Ada County, State of Idaho,) a tract of land was duly set aside as a military reservation for the establishment of a military post, and that the reservation was subsequently occupied as such post and so continued to be used by the Government of the United States, for the purpose in question, up to the time when the bill was filed. It was alleged, moreover, that flowing across the reservation was a stream of water known as Cottonwood Creek, which was non-navigable, but which afforded "an ample supply for the agricultural, domestic and practical purposes of the officers and troops of said military post, and no more, and that said stream of water, together with all the uses and privileges aforesaid, belong to and are the property of plaintiffs; and that from the time of the occupancy and location of said post, to wit, the month of July, A.D. 1864, the waters of said stream have been continually used and appropriated, and now are used and appropriated, for all

agricultural, domestic and practical purposes by plaintiff, through its said officers and troops."

The bill then averred that at a point on said stream above the reservation the defendant, his agents and employés, "are now, and have been since June, 1894, actually engaged in wrongfully and unlawfully diverting the waters of said Cottonwood Creek, and the whole thereof, from their natural course over and across the premises hereinbefore described. And the said defendant, his agents and employés have, since said June, 1894, been and now are actually engaged in diverting and appropriating the waters of said stream, and the whole thereof, and preventing and obstructing the same from flowing in its natural channel across the said military reservation, and thereby rendering the said premises unfit for use and occupancy as a military post."

Averring the illegality of defendant's acts in diverting the water from the stream and that all the water flowing in its natural course was essential for the purpose of the reservation, the bill asserted the title of the United States to all the water in the stream, and prayed that the defendant be enjoined from appropriating any portion thereof for his use "as aforesaid." In his answer the defendant denied that the water drawn off by him deprived the reservation of water necessary for any of its purposes, and on the contrary charged that there was sufficient water in the stream to meet the demands not only of the water right, which he asserted was vested in him, but also to supply every demand for water, which the reservation might need. He alleged that pursuant to the laws of the Territory of Idaho, in 1877 he had located a perpetual water right for five hundred cubic inches of water, at a point on the stream above the place where it flowed through the reservation, and that this location of water right was sanctioned by the laws of the United States. It was besides averred that during the years 1894 and 1895 "one Peter Sonna, and his associates, whose names are unknown to this defendant, without defendant's consent, diverted a large amount of the waters of said stream from the head waters thereof, and above the point on said stream where plaintiff alleges this defendant has obstructed and diverted the

same, and led the same through pipes to a reservoir on said military post, and that said military post, the officers and troops thereon stationed, have used the waters so stored in part, and have permitted large quantities thereof to pass across said reservation and to be used by the said Peter Sonna for mechanical and other purposes."

A stipulation was entered into between the parties containing an agreed statement of facts, which showed substantially this: That the reservation in question was established prior to the initiation by the defendant of his alleged water right; that "in 1877 the defendant located for agricultural, irrigation and other and domestic and useful purposes, 500 inches of the waters flowing in Cottonwood Creek, and diverted them upon the lands adjacent and in the vicinity of the easterly and southeasterly side of the military reservation, and has continuously used, and is now using, such waters, or portions thereof, for agricultural and irrigating purposes ever since that time upon such lands. His lands consist of a homestead of 160 acres, a desert entry of 160 acres, and his wife's desert of about 70 acres; he has expended between $8000 and $10,000 in the construction of necessary ditches, flumes, reservoirs, laterals and other improvements necessary for the reclamation of such lands, which were all desert in character, and of a class known as 'arid lands,' incapable of producing crops of fruit without the application of water. By means of the use of this water and the rights claimed under such location, he and his grantee have acquired title to said desert lands, and have been enabled to cultivate large annual crops of farm produce annually, and to propagate large orchards, which without the water they could not have done."

The statement, moreover, indicated the mode in which the reservation drew its supply of water from the stream, some of it being taken above the point where the defendant's water right was located, and contained the following:

"On or about the year 1894 one Peter Sonna and his associates, without the consent of the defendant, went upon the head waters of said 'Five-Mile Gulch,' one of the main tributaries of Cottonwood Gulch, and at sundry points gathered and

appropriated the waters of large and flowing springs there situated, and which are supply springs of said 'Five-Mile Gulch,' and the stream there situated, and about four miles above the point of the defendant's diversion, and conveyed the waters of said springs by means of pipes and mains, the latter being commonly known as '2-inch pipe,' down the mountains to the reservoir before mentioned as located above the officers' quarters on the reservation. The reservoir has a capacity of about 570,000 gallons. The waters so gathered and conducted were and now are stored in said reservoir, and distributed therefrom from time to time as hereafter shown. A portion of the waters from the springs, if not diverted, would eventually flow into Cottonwood Creek above defendant's point of diversion.

"The waters stored in the Sonna reservoir aforesaid are used for fire purposes only on the reservation, and are also conveyed through mains about three-quarters of a mile into Boise City, where they are used in the running of a passenger elevator in one of the largest office buildings of the city, for drinking and closet purposes therein, and for domestic [uses] in several city residences, and, in case of danger, for fire purposes, through hydrants located along the line of said main."

The lower court concluded that as the stream was not navigable and was wholly on the public domain, the defendant had no right to appropriate any of the waters as against the United States, and therefore enjoined the taking by him of any water, from the stream, above the reservation except to the extent that license to do so might be given by the commandant of the post.

The Circuit Court of Appeals, to which the cause was taken, referring to *Atchison* v. *Peterson*, 20 Wall. 507, 512; *Basey* v. *Gallagher*, 20 Wall. 682; *Broder* v. *Water Company*, 101 U. S. 274; and *Sturr* v. *Beck*, 133 U. S. 541, concluded that the defendant had acquired a valid water right even as against the United States, and therefore reversed the judgment of the trial court, and remanded the cause to that court for further proceedings in accordance with the views expressed in its opinion. The opinion of the court, after stating the right of

the defendant to acquire a water privilege, on public lands of the United States, even as against the United States, declared as follows:

"His [the defendant's] appropriation was, of course, subject to the prior appropriation and use of the waters of the stream made by the government officials for the purpose of the military post reservation, which consisted of 640 acres of land, and was located on the stream in question below the point of the appellant's diversion."

It is charged in the assignment of errors that the decision of the Court of Appeals was erroneous, first, because it recognized the right of the defendant to acquire a water right as against the United States; and, second, because it held that the water right of the defendant, which originated after the establishment of the reservation, could deprive the reservation of water necessary for its purposes. This is asserted to be the consequence of the decree, because it is argued it may be construed as depriving the Government of the right to use but the quantity of water which had been previously actually appropriated for the use of the reservation, thus preventing it from enjoying the water essential for the purposes of the post, and rendered necessary by its expansion and development. To the first question the argument at bar was principally addressed.

Before considering the assignments, however, we are met on the threshold of the case with the question whether the record is properly here, because of the want of finality of the judgment rendered by the Circuit Court of Appeals. On its face the decree of that court is obviously not a final judgment, since it did not dispose definitively of the issues presented, but simply determined one of the legal questions arising on the record, and remanded the case to the lower court for further proceedings. When the state of the record, upon which the Court of Appeals passed, is considered in the light of the pleadings and agreed statement of facts, it becomes obvious that the decree, by that court rendered, was not only not in form, but also was not in substance a final disposition of the controversy. The cause of action alleged in the complaint was the

diversion of water by the defendant from the stream, to the detriment of the requirements of the reservation, by a water right acquired by the defendant after the establishment of the reservation. The agreed statement of facts, although it made it unquestioned that the defendant's asserted water right had been located on the stream above the reservation, after its establishment, also made it equally clear that after such location, above the point where the defendant's water right was fixed, water had been drawn off and carried to the reservation, and there retained in a reservoir and supplied, in part at least, to Boise City for purposes wholly foreign to the military post. There was nothing whatever in the agreed statement of facts by which it could be determined whether the amount of water thus drawn and carried to the post and used for purposes foreign to its wants would, if used for the purposes of the post alone, not have been entirely adequate to supply every present or potential need. Conceding on the general question of law that the defendant could acquire a water right, as against the United States, subject to the paramount and previous appropriation of the reservation, the court manifestly, from the state of the record, was not in a position to adjudge the rights of the parties without further proof as to exactly what would be the situation if water had not, subsequent to the establishment of the water right of the defendant, been taken from the sources of supply above his location and carried to the reservation and there distributed for other than reservation purposes. This condition of things rendered it therefore essential to remand the cause in order that the exact situation might be ascertained before the rights of the parties were finally passed upon. The fact that the decree appealed from was not final is moreover conclusively demonstrated by considering that if on the present appeal we should conclude that the judgment of the Court of Appeals was correct, we would be unable to dispose of the controversy, and we would be obliged, as did the Court of Appeals, to remand the case to the trial court for further proceedings. The gravamen of the complaint was that the alleged water right of the defendant had deprived the reservation of water required for its purposes.

Certainly if on a further trial the proof should establish that the deficiency of supply at the reservation arose not from the drawing off by the defendant of water covered by his water right, but from the act of those who, subsequent to the location of the defendant's asserted water right, tapped the sources of the supply of the stream and carried the water to the reservation whence it was distributed to Boise City, a very different condition of fact from that stated in the complaint would be presented. It follows, from these conclusions, that the judgment below was not final, and the appeal taken therefrom must be, and is,

*Dismissed for want of jurisdiction.*